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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 205

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

GERALD A. EUBANK

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED JULY 5, 1940
CERTIORARI GRANTED OCTOBER 14, 1940

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vs.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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1 Before United States Board of Tax Appeals

Docket No. 86200

GERALD A. EUBANK, PETITIONER
vs.
COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket entries

Appearances: For Taxpayer: Bernhard Knollenberg, Harry J. Rudick, Esq. For Commissioner: Albert E. Arent, Esq.

1936

Aug. 21—Petition received and filed. Taxpayer notified. Fee paid.
" 21—Copy of petition served on General Counsel.
Sept. 28—Answer filed by General Counsel.
" 30—Copy of answer served on taxpayer.
Oct. 7—Motion for circuit hearing at New York City filed by taxpayer, October 8, 1936, granted.

1937

Aug. 20—Hearing set week of November 29, 1937, in New York City, N. Y.
Dec. 7—Hearing had before Marion J. Harron, on merits. Submitted. Stipulation of facts filed—Briefs due as per rules.
" 24—Transcript of hearing of December 7, 1937, filed.

1938

Jan. 19—Brief filed by taxpayer. January 19, 1938, copy served on General Counsel.
Feb. 7—Brief filed by General Counsel.
Mar. 3—Reply brief filed by taxpayer.

2 1939

Mar. 14—Findings of Fact and Opinion rendered. Marion J. Harron, Division 13. Decision will be entered under Rule 50.
Apr. 21—Computation of deficiency filed by General Counsel.
" 24—Hearing set May 10, 1939, on settlement under Rule 50.
" 26—Consent to settlement filed by taxpayer.
" 29—Decision entered, Marion J. Harron, Division 13.
July 22—Petition for review by United States Circuit Court of Appeals, Second Circuit, with assignments of error filed by taxpayer.
" 26—Proof of service filed by taxpayer (and notice).
Aug. 2—Agreement substituting stipulation of facts for statement of evidence filed.
" 2—Praecipe filed—proof of service thereon. (No counter praecipe will be filed.)

3 Before United States Board of Tax Appeals

Docket No. 86200

Petition

Filed Aug. 21, 1936

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (IT:AR:A–2, MEK–90D), dated August 4, 1936, and as a basis of his proceeding alleges as follows:

1. The petitioner is a citizen of the United States, with his office at No. 40 Wall Street, New York, New York.

2. The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the petitioner on August 4, 1936.

3. The taxes in controversy are income taxes for the year 1933, and for $943.34.

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

Inclusion in the petitioner's gross income for the year 1933 of the sum of $17,207.94, consisting of commissions, the right, title and interest to which had been sold, transferred, and set over to the Union Trust Company of Detroit by the petitioner on March 28, 1928.

5. The facts upon which the petitioner relies as a basis of this proceeding are as follows:

4 (a) Petitioner and one Hugh D. Hart, under the firm name of Hart & Eubank, were appointed general agents in New York City for the Aetna Life Insurance Company by a written appointment dated August 20, 1924. Petitioner, as successor to said firm of Hart & Eubank, was appointed general agent in New York City for the Aetna Life Insurance Company by a written appointment dated June 28, 1927.

(b) As general agent of said Aetna Life Insurance Company, and under the terms and conditions of said written appointment, petitioner became entitled to certain renewal commissions.

(c) By an instrument dated March 28, 1928, petitioner sold, transferred, and set over to the Union Trust Company, of Detroit, Michigan, as Trustee, all of said commissions then due or to become due under the terms and conditions of said appointments and all his right, title, and interest therein. A copy of said instrument is attached hereto and made a part hereof and marked Exhibit B.

(d) At the time of the execution of said instrument, to wit, March 28, 1928, petitioner had no further obligation to said Aetna Life

Insurance Company in regard to said commissions, whether of collecting premiums or otherwise.

(e) The commissions included by the Commissioner of Internal Revenue in the petitioner's income for 1933 (see Exhibit, page 2, Item No. 1), were commissions paid by said Aetna Life Insurance Company to said Union Trust Company by virtue of said instrument dated March 28, 1928 (Exhibit B) during said year 1933.

5 Wherefore, the petitioner prays that this Board may hear the proceeding and determine (a) that the aforesaid commissions do not represent taxable income of the petitioner, and (b) that there is no deficiency.

BERNHARD KNOLLENBERG,
HARRY J. RUDICK,
Counsel for Petitioner,
25 Broadway, Borough of Manhattan,
New York City, N. Y.

[*Duly sworn to by Gerald A. Eubank; jurat omitted in printing.*]

6 *Exhibit A to petition*

IT:AR:A-2.
MEK-90D.

AUG. 4, 1936.

Mr. GERALD A. EUBANK,
40 Wall Street, New York, New York.

SIR: You are advised that the determination of your income-tax liability for the taxable year(s) 1933 discloses a deficiency of $943.34 as shown in the statement attached.

In accordance with section 272 (a) of the Revenue Act of 1932, as amended by section 501 of the Revenue Act of 1934, notice is hereby given of the deficiency mentioned. Within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency and will prevent the accumulation of interest,

since the interest period terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING,
Commissioner.

By (Signed) W. T. SHERWOOD,
Acting Deputy Commissioner.

Enclosures:
Statement.
Form 870.
MEK/MTR-2.

7 STATEMENT

IT:AR:A-2.
MEK-90D.
In re Mr. Gerald A. Eubank, 40 Wall Street, New York, New York

INCOME TAX LIABILITY

Year, 1933; tax liability, $943.34; tax assessed, none; deficiency, $943.34.

The report dated March 16, 1936, prepared by Revenue Agent Robert E. Dame, a copy of which was transmitted to you on April 28, 1936, has been reviewed and approved by this office with the exceptions as follows:

As a result of the conference held on June 3, 1936, in the revenue agent's office, additional deductions have been allowed as follows:

Christmas cards to brokers	$70.58
Traveling expenses	363.77
Total	434.35

Relative to the inclusion in taxable income of $17,207.94 representing life insurance renewal commission received by a trust established by you, the Bureau holds that the income in question is taxable to you.

Information on file in the Bureau indicates that on March 28, 1928, you made a conveyance in trust of certain insurance renewal commissions then due or to become due in the near future,

8 arising out of a contract with the Aetna Life Insurance Company for the uses and benefits set forth in another instrument dated June 18, 1928. After that date the Aetna Life Insurance Company paid all renewal commissions to the trustee, who accounted for the income in returns filed for the trust.

The United States Circuit Court of Appeals for the Eighth Circuit, in the case of VanMeter v. Commissioner, 61 Fed. (2d) 817, held that income in the form of renewal commissions, where

the general agent was the "earner," was taxable to such agent notwithstanding the fact that the agent had assigned the renewal commissions and the insurance company had paid them direct to the assignee. In so holding the court stated:

"The rule and intent of the taxing statutes is that the earner of income which he might and, normally, would receive and enjoy for himself is not relieved because he chooses not to receive or not to enjoy it, and this is not necessarily changed by such deprivation taking the form of an obligation legally binding him thereto.

"The earner may, in a legally binding way, dispose of his earnings, whether they are already earned or are to be earned, without affecting in the slightest manner his status as earner thereof and his resulting liability for taxation thereon as income."

To the same effect see Lucas v. Earl, 281 U. S. 111; Corless v. Powers, 281 U. S. 376; Burnet v. Leininger, 265 U. S. 136; Bishop v. Commissioner, 65 Fed. (2d) 298; Saenger v. Commissioner, 69 Fed. (2d) 631; and Parker v. Routzahn, 56 Fed. (2d) 730.

9 Net income is adjusted as follows:

Net income reported on return		$3,186.42
Add:		
1. Renewal commissions	$17,207.94	
2. Adjustment of expenses	71.64	
3. Other deductions	772.79	
	18,052.37	
Deduct:		
4. Trust income—		
Other income	5,172.61	
Dividends	371.69	
	5,544.30	
		12,508.07
Net income corrected		15,694.49
Less: Personal exemption and credit for dependents		4,500.00
Balance subject to normal tax		11,194.49
Normal tax at 4% on $4,000.00		160.00
Normal tax at 8% on $7,194.49		575.56
Surtax on $15,694.49		207.78
Total tax		943.34
Tax assessed, account #657508		None
Deficiency		943.34

EXPLANATION OF CHANGES

1. Life insurance renewal commissions are held to be taxable to you rather than to the trust established by you.

10 2. Expenses made in 1932 are disallowed for the year 1933 in the amount of $84.97. Expenses of $13.33 are

allowed for the year 1933. This adjustment is reflected in your drawing account on the books of Johnson & Higgins.

3. Other deductions have been disallowed in the amount of $772.79, as follows:

Automobile expenses	$378.60
Business, travel, and entertainment expenses	394.19
Total	772.79

Auto expenses not connected with your trade or business are disallowed.

Christmas gifts of $221.95 and $172.24 paid in contesting prior years tax assessments represent personal expenses and are, therefore, disallowed.

4. Other income and dividends from a trust are eliminated for the reason that the income is not considered to be trust income and has been included in your return under renewal commissions on life insurance.

In view of the statement in a letter dated July 24, 1936, from your representative, Mr. H. J. Rudick, this statutory notice of deficiency is issued.

A copy of this letter has been mailed to your representative, Mr. Harry J. Rudick, 23 Broadway, New York, New York, in accordance with the authority conferred upon him in the power of attorney executed by you and on file with the Bureau.

MEK/MTR-2.

11 *Exhibit B to petition*

Know all men by these presents, that I, Gerald A. Eubank, of South Orange, County of Essex, State of New Jersey, am the same person who with Hugh D. Hart under the firm name of Hart & Eubank was appointed by the Aetna Life Insurance Company of Hartford, Connecticut, as General Agent for said Company in New York City under written appointment which was executed at Hartford, State of Connecticut, the 20th day of August A. D. 1924 and which took effect on the 1st day of September A. D. 1924; and I am the same person who was appointed General Agent by said Company as successor to said Hart & Eubank to represent said Company as General Agent in New York City, under written appointment which was executed at Hartford, State of Connecticut, the 28th day of June A. D. 1927, and which took effect on the 1st day of July A. D. 1927.

Now, in consideration of the sum of One Dollar ($1.00) and other good and valuable considerations, the receipt whereof is hereby acknowledged, I do hereby sell, transfer and set over unto the Union Trust Company, Detroit, Michigan, Trustee, all commis-

ons now due me or to become due me under or on account of and ubject to the terms and conditions of said appointments or amendents thereto and all right, title, and interest therein which I now ave or may have at any future time, hereby waiving all right or tle to and interest in said appointments or amendments thereto nd authorizing and requesting said Company to pay all said commissions to the said Union Trust Company, Trustee, which is hereby authorized to receipt and discharge the same in full.

I do also hereby sell, assign, transfer, and set over unto the said Union Trust Company, Trustee, all my interest in ommissions on Group and Wholesale business as covered by indiidual agreements under each policy placed through the General gencies of Hart & Eubank and/or G. A. Eubank, that may be ow due or to become due me from said Aetna Life Insurance Comany and all right, title, and interest therein which I now have or ay have at any future time, hereby waiving all right or title to nd interest in said commissions and authorizing and requesting aid Company to pay all said commissions to the said Union Trust ompany, Trustee, which is hereby authorized to receipt and discharge the same in full.

In witness whereof, I have hereunto executed this assignment, release, and waiver in triplicate, under seal, at New York, State of ew York, this 28th day of March A. D. 1928.

GERALD A. EUBANK.

Signed, sealed, and delivered in the presence of A. E. Anderson.

TATE OF NEW YORK,
County of New York, ss:

On this 28 da of March A. D. 1928, before me, the undersigned, ppeared Gerald A. Eubank, personally known to me, and duly cknowledged the execution of the above instrument.

JNO. A. LEPEYRE,
Notary Public.

Notary Public, Bronx County. Certificate filed in N. Y. Co. o. —.

Before United States Board of Tax Appeals

Answer

Filed Sept. 28, 1936

The Commissioner of Internal Revenue, by his attorney, Herman Oliphant, General Counsel for the Department of the Treasry, for answer to the petition filed herein, admits and denies, as ollows:

1. Admits the allegations contained in paragraph 1 of the petition.

2. Admits the allegations contained in paragraph 2 of the petition.

3. Admits that the taxes in controversy are income taxes for the year 1933 but denies that the amount in controversy is $943.34.

4. Denies the allegations of error contained in paragraph 4 of the petition.

5. Denies the allegations contained in paragraphs 5 (a) to (e), inclusive, of the petition.

Denies generally and specifically each and every allegation in the petition not hereinbefore admitted, qualified, or denied.

Wherefore, it is prayed that the Commissioner's determination be approved and that petitioner's appeal be denied.

(Signed) HERMAN OLIPHANT,
(Signed) Herman Oliphant,
General Counsel for the Department of the Treasury.

Of Counsel:

HARRY R. HORROW,
Special Attorney, Bureau of Internal Revenue.

HRH/m/9/25/36.

14 Before United States Board of Tax Appeals

Docket No. 86200

Findings of fact and opinion

Promulgated March 14, 1939

Petitioner assigned the contingent right to receive future commissions on insurance renewal premiums to a trust company in 1924 and 1928. In 1933 commissions were paid to the assignee and respondent taxed petitioner thereon because he was the earner of the income. Held, the assignment was or future compensation for personal services and, since petitioner was the earner of the income, it is taxable to him regardless of the anticipatory assignments. Lucas v. Earl, 281 U. S. 111, and Van Meter v. Commissioner, 61 Fed. (2d) 817, followed.

Harry J. Rudick, Esq., for the petitioner. Albert E. Arent, Esq., for the respondent.

The respondent determined a deficiency in the petitioner's income tax for the calendar year 1933 in the amount of $943.34. The petitioner alleges the respondent erred in including in his taxable income certain renewal insurance commissions which were paid in the taxable year to petitioner's assignee.

Findings of fact

Petitioner has an office at 40 Wall St., New York, New York, and notice of deficiency was mailed to that address.

From January 1 to September 1, 1924, petitioner was branch manager for the State of Michigan of the Canada
15 Life Assurance Co., under a contract with that company. After termination of this contract, on September 1, 1924, petitioner became entitled to renewal commissions thereunder with respect to life-insurance premiums collected thereafter on policies written prior to the termination of the contract.

On November 24, 1924, petitioner executed and delivered the following assignment to the Union Trust Co., Detroit, Michigan (subsequently the Union Guardian Trust Co.):

"For a valuable consideration, the undersigned, Gerald A. Eubank, hereby sells, assigns, and transfers to the Union Trust Company, of Detroit, Michigan, all his right, title, and interest in and to a certain agreement bearing date the 22nd day of January 1924, between Canada Life Assurance Company, of the first part, and said Gerald A. Eubank, party of the second part, made in connection with the employment by the said Assurance Company of the said Eubank as a branch manager for said Company, together with all moneys payable or to become payable to the said Eubank under and by virtue of the terms of the said contract.

"In witness whereof, said Gerald A. Eubank has hereunto set his hand and seal this 24th day of November 1924."

The Canada Life Assurance Co. acknowledged receipt of the instrument of assignment.

From September 1, 1924, to June 30, 1927, the petitioner and one Hart, a partner, were general agents in New York City for the Aetna Life Insurance Co., under a contract with that com-
16 pany dated August 20, 1924. This contract was terminated on June 30, 1927, whereupon petitioner individually became general agent in New York City for the Aetna Life Insurance Co., under a contract effective July 1, 1927. Petitioner became entitled to receive one-half of whatever renewal commissions became payable subsequent to June 30, 1927, without obligation to perform any further services.

Petitioner on July 19, 1927, resigned the general agency granted by the last-mentioned contract, such resignation to take effect September 30, 1927. However, in consideration of $12,000 received from his successor appointed by the insurance company, petitioner agreed to make his resignation effective August 31, 1927, i. e., one month earlier, without, however, affecting his right to renewal commissions. After August 31, 1927, petitioner was not required

to render any further services in order to become entitled to the renewal commissions provided for by the agency contract.

In each agency contract between petitioner and the Aetna Life Insurance Co. the insurance company reserves the right to change the rates of commissions payable to the agent. In these contracts it is agreed that in the event of termination of the contracts the company will pay at the end of each three months after termination "commissions" on the premiums actually collected on business secured under the contracts prior to such termination on which the agent would have been entitled to renewal commissions in event of continuance of the contract, in stated percentages for a certain number of years, less any commissions payable to subagents and less any indebtedness of the agent to the insurance company. Then the following appears:

"Said party of the second part [petitioner] hereby agrees
17 that the above-described settlement shall be accepted in full compensation for his interest in the agency hereby conveyed."

The contract with the Canada Life Assurance Co., describes compensation of the branch manager under the contract as first year commissions and renewal commissions, payable at certain rates.

Each of the two contracts with Aetna provides that no assignment, transfer, or disposal of the agency or business, or any interest whatever therein, can be made without the consent and approval of the insurance company in writing. The contract with Canada Life provides that "any rights of the Branch Manager under this agreement shall not be sold or assigned by him without the consent of the Company in writing."

Under all of the contracts, petitioner was an agent of the insurance companies.

On March 28, 1928, petitioner executed and delivered the following assignment to the Union Trust Co., Detroit, Michigan (subsequently, Union Guardian Trust Co.):

"Know all men by these presents, that I, Gerald A. Eubank, of South Orange, County of Essex, State of New Jersey, am the same person who with Hugh D. Hart under the firm name of Hart & Eubank was appointed by the Aetna Life Insurance Company of Hartford, Connecticut, as General Agent for said Company in New York City under written appointment which was executed at Hartford, State of Connecticut, the 20th day of August A. D. 1924, and which took effect on the 1st day of September A. D. 1924; and I am the same person who was appointed General Agent by said Company as successor to said Hart & Eubank to represent
18 said Company as General Agent in New York City, under

written appointment which was executed at Hartford, State of Connecticut, the 28th day of June A. D. 1927, and which took effect on the 1st day of July A. D. 1927.

"Now, in consideration of the sum of One Dollar ($1.00) and other good and valuable considerations, the receipt whereof is hereby acknowledged, I do hereby sell, transfer, and set over unto the Union Trust Company, Detroit, Michigan, Trustee, all commissions now due me or to become due me under or on account of and subject to the terms and conditions of said appointments or amendments thereto and all right or title to and interest in said appointments or amendments thereto and authorizing and requesting said company to pay all said commissions to the said Union Trust Company, Trustee, which is hereby authorized to receipt and discharge the same in full.

"I do also hereby sell, assign, transfer, and set over unto the said Union Trust Company, Trustee, all my interest in commissions on Group and Wholesale business as covered by individual agreements under each policy placed through the General Agencies of Hart & Eubank and/or G. A. Eubank, that may be now due or to become due me from said Aetna Life Insurance Company and all right, title, and interest therein which I now have or may have at any future time, hereby waiving all right or title to and interest in said commissions and authorizing and requesting said Company to pay all said commissions to the said Union Trust Company, Trustee, which is hereby authorized to receipt and discharge the same in full.

19 "In witness whereof I have hereunto executed this assignment, release, and waiver in triplicate, under seal, at New York, State of New York, this 28th day of March A. D. 1928."

The Aetna Life Insurance Co. acknowledged receipt of the instrument of assignment as follows:

"UNION TRUST COMPANY,
"*Detroit, Michigan.*

"GENTLEMEN: We have received from Mr. Gerald A. Eubank and placed on file copy of an assignment executed by him in favor of the Union Trust Company, trustee, covering all of Mr. Eubank's commission interests under said contracts and amendments thereto with this Company as named in the assignment.

"The Aetna Life Insurance Company does not guarantee the sufficiency or validity of any assignment and in placing this assignment on file it must be understood that the Company does not waive any of its rights under the contracts or amendments thereto.

"Checks will be forwarded from the Home Office to the Union Trust Company covering commissions as they accrue according to

the terms of the contracts. There will also be checks from time to time sent the Union Trust Company from the Company's cashier in New York City covering various items which are being collected by him."

During the year 1933 petitioner's assignee, the Union Guardian Trust Co., received renewal commissions payable under the provisions of the agency contracts referred to above, as follows:

From Aetna Life Insurance Co., Hart & Eubank contract	$12,354.16
From Aetna Life Insurance Co., Eubank contract	591.47
From Canada Life Assurance Co	2,667.16
	$15,612.79

In computing the deficiency here in question the respondent added to petitioner's taxable income the renewal commissions received by petitioner's assignee in 1933 in the amount of $17,207.94. This amount was incorrect. It is agreed that the amount of such commissions was $15,612.79. Respondent stated, in the explanation of the adjustments made in determining the deficiency, as follows:

"Relative to the inclusion in taxable income of $17,207.94 [sic], representing life insurance renewal commissions received by a trust established by you, the Bureau holds that the income is taxable to you. Information on file in the Bureau indicates that on March 28, 1928, you made a conveyance in trust of certain insurance renewal commissions then due or to become due in the near future, arising out of a contract with the Aetna Life Insurance Co. for the uses and benefits set forth in another instrument dated June 18, 1928. After that date the Aetna Life Insurance Co. paid all renewal commissions to the trustee, who accounted for the income in returns filed for the trust. * * * Life insurance renewal commissions are held to be taxable to you rather than to the trust established by you."

The Commissioner disallowed other deductions claimed as business expenses, and petitioner concedes the disallowance to be correct.

21 *Opinion*

HARRON: The sole question presented in this proceeding is whether petitioner is taxable upon commissions paid in the taxable year to an assignee. The commissions are of a particular type, i. e., commissions payable by insurance companies upon insurance renewal premiums paid by policyholders to them. Respondent contends that such commissions constitute earned income, "compensation for personal service," within the definition of gross income as defined in section 22 (a) of the Revenue Act

of 1932, set forth below in part,[1] and that such income is taxable to petitioner, regardless of the assignments in earlier years, because he is the person who earned the income.

Respondent urges that the question be considered in its broad aspects rather than upon any possible distinctions between the form of the assignment made in 1924, of the interest in the contract, and of the one made in 1928, of the commissions. Respondent argues that the principle expressed in Lucas v. Earl, 281 U. S. 111, is controlling.

Petitioner contends that he is not taxable on the commissions paid in 1933 upon either or both of the following arguments: (a) He contends that the commissions were fully earned prior to the assignments, his services having been performed fully, so that the assignment was of "past earnings" and, therefore, the tax liability is on the assignee. Petitioner argues that the principle of the Lucas v. Earl case is limited to assignment of earnings only where future services are required. (b) The right to receive future commissions was a type of property in praesenti at the time of the assignments, which may be assigned, and the commissions, when paid, vest in the assignee and are taxable to him. Petitioner relies on Hall v. Burnet, 54 Fed. (2d) 443. Other cases relied on by petitioner for either or both propositions are Matchette v. Helvering, 81 Fed. (2d) 73; certiorari denied, 298 U. S. 677; Shanley v. Bowers, 81 Fed. (2d) 13; Walter L. Ross, 30 B. T. A. 496; affd., 83 Fed. (2d) 18; Julius E. Lilienfeld, 35 B. T. A. 391; Louis Boehm, 35 B. T. A. 1106; Blair v. Commissioner, 300 U. S. 5. These cases are not controlling and are distinguishable.

22

The notice of deficiency refers to a separate instrument said to relate to a trust and to have been executed by petitioner June 18, 1928. The record does not contain any explanation of this reference, nor any denial of such, and the pleadings raise no question about the use of the commissions in question, so that this is not a case of income attributable to an assignor or settlor by reason of application of the income for his use or benefit. Cf. Old Colony Trust Co. v. Commissioner, 279 U. S. 716; United States v. Boston & Maine Ry. Co., 279 U. S. 732; Burnet v. Wells, 289 U. S. 670; Douglas v. Willcuts, 296 U. S. 1, 9; Lucy A. Blumenthal, 30 B. T. A. 591; affd., 296 U. S. 389; United States v. L. Manuel Hendler, 303 U. S. 564; Helvering v. Coxey, 297

[1] SEC. 22. GROSS INCOME.
(a) GENERAL DEFINITION.—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, business, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

U. S. 694. And, in the way the question is presented, the burden of proof on petitioner does not extend to proving that the commissions were not under petitioner's control or were not applied to his use or benefit. Cf. Commissioner v. Grosvenor, 85 Fed. (2d) 2, 3; Bishop v. Commissioner, supra; Hall v. Helvering, 68 Fed. (2d) 399. If the question involved is one which should be decided on the principle that earned income is taxable to the earner and that his tax liability may not be escaped by anticipatory arrangements, it will become immaterial, in cases like this, what use is made of the commissions by the assignee. On the other hand, if it should be finally decided by the courts that an effective assignment for income-tax purposes can be made of such commissions, relieving the earner-assignor from tax liability, then it will become important, in later cases, to prove that the commissions are not applied to the benefit of the assignor or used according to his control. Cf. Burnet v. Wells, supra, where it was pointed out that tax liability may rest upon the enjoyment of privileges and benefits by the taxpayer so as to require consideration of the ends in the mind of the assignor in combination with assignment of bare legal title.

23

Taxation of commissions on renewal commissions has been considered in a few cases by this Board and in several cases by the Circuit Courts of Appeal, and the present unsettled state of the law on the question is to be found by reference to these particular cases, set forth in a schedule below for convenience.[2] In all reported cases, this Board has held such commissions taxable to the earner-assignor. In all the cases before the courts, subsequent to the Edwards and Woods cases, the courts have held the commissions taxable to the earner-assignor, except in the Hall v. Burnet case. The Edwards and Woods cases did not involve any question of tax liability of an earner-assignor, for no assignment of commissions was involved in those cases. In all the other insurance commissions cases, the question was essentially the same, although there appear to be some differences in the terms of assignments. It is difficult to find any essential differences in the question before the courts in the cases where assignment of the commissions was made and there is a conflict between the Hall v. Burnet case and the others.

24

In this proceeding, the assignments executed by petitioner adopted different phraseology. In the 1924 assignment all inter-

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[2] Board cases: *Arthur F. Hall*, 17 B. T. A. 752; reversed. *Hall* v. *Burnet*; *James M. Stokes, Jr.*, 22 B. T. A. 1386. Court cases: *Edwards* v. *Keith*, 231 Fed. 110 (C. C. A., 2d Cir.); *Woods* v. *Lewellyn*, 252 Fed. 106 (C. C. A., 3d Cir.); *Hall* v. *Burnet*, 54 Fed. (2d) 443 (App. D. C.); *Bishop* v. *Commissioner*, 54 Fed. (2d) 298 (C. C. A., 10th Cir.); *Parker* v. *Routzahn*, 56 Fed. (2d) 730 (C. C. A., 6th Cir.); *Van Meter* v. *Commissioner*, 61 Fed. (2d) 817 (C. C. A., 8th Cir.); *Hall* v. *Helvering*, 68 Fed. (2d) 399 (App. D. C.).

est in an agency contract is assigned. In the 1928 assignment all commissions due or to become due and all right to them is assigned. We regard these differences as immaterial in this proceeding because it is evident that in both instances petitioner intended to assign future commissions. No evidence is present to the contrary. The question presented here does not relate to any question arising between the assignor and assignee under the assignments. The question arises out of a conflict between petitioner and the Commissioner over taxation of commissions paid in 1933. It is clear that petitioner in executing the assignments anticipated that commissions might be paid in the future, and he attempted to assign them to another in advance of payment of the commissions. The commissions were paid. It comes to the same thing so far as the tax question is concerned, whether one or the other phrases was used in the assignment as will be shown.

The contracts under which petitioner was an agent of the insurance companies were contracts of employment, in a broad sense. Compensation for services of petitioner consisted, in part, of commissions on renewal premiums which the companies agreed to pay over periods of ten years, more or less, from and after the time the first premium was paid on a policy. While the agency
25 contracts under which petitioner obtained the business giving rise to the commissions were terminated, nevertheless, the contingent obligations of the companies to pay future commissions continued. The companies retained certain rights, among them the right to offset any debt of petitioner against any commissions payable and the right to change the percentage at which commissions should be payable. It is provided that petitioner cannot dispose of any interest in the contracts without the consent and approval of the insurance companies.

As for the right to commissions arising out of said contracts and payable after their termination, it is clear that in 1924 and 1928, when the assignments were made, the rights were future rights. No present rights had matured when the assignments were made. The obligations of the insurance companies to pay the premiums could not arise until a future time when, as, and if policyholders should pay renewal premiums on business obtained by petitioner. His rights to commissions at the dates of the assignments were contingent, unmatured, uncertain, and unascertained. The amounts of future commissions were uncertain. The insurance companies did not accept in writing the assignments of future commissions made by petitioner. They paid the commissions in 1933 to the assignee, but, as far as we know, they were not legally obliged to do so. It appears that, even after making the assignments, petitioner might have collected the future commissions. Cf.

Wood v. Commissioner, 74 Fed. (2d) 78. Therefore, it is clear that petitioner had no present matured rights to assign and divest himself of, in 1924 and 1928, and, at best, the assignments were of money not yet due or of a contingent future debt of the insurance companies. No legal title to the future commissions was conveyed in 1924 and 1928, because all that was assigned was a chose in
26 action. Rather, petitioner gave his assignee a power to collect and keep the commissions when they should be paid. Petitioner's assignee obtained, under the assignments when made, only an equitable interest in contingent, future commissions. "The assignment of future earnings cannot be regarded as an immediate transfer of any property, but the assignee has an authority or power to collect, and an implied agreement on the assignor's part not to revoke the power." Williston on Contracts, vol. 1, sec. 414. See also, section 447. From the above, we believe it follows that it comes to the same thing whether one or the other phrases of assignment is used, i. e., all interest in the agency contracts, or the right to receive commissions. It is not enough to describe the assignments as relating to an interest in an existing contract, but it is necessary to consider what present interest the assignments could cover.

From the above, it is difficult to agree with the premise upon which the court in the Hall v. Burnet case arrived at its conclusion. The court in that case found that what was assigned was a species of property that gave rise to future income. The court recognized that if what was sought to be conveyed was personal earnings, such would be taxable to the assignor though he never received it. The line drawn is fine. Commissions on renewal premiums are compensation for personal service and are income within the statutory definition thereof. Woods v. Lewellyn, 252 Fed. 106. When the commissions are paid, they represent compensation for past services, earned income. So do salary and wages. Where salary is payable under a contract of ordinary employment, the right to salary under such contract is a future right that does not mature until salary becomes payable. A right to future salary under a contract of ordinary employment may be validly
27 assigned. So it would seem to follow, from the doctrine of the Hall v. Burnet case, that if an earner should assign all interest in a contract of ordinary employment, consisting of a future right to future salary, it would be said that the assignment was of a property right and not of salary. But, if this were correct, it would not follow that the earner-assignor of the future salary would not be liable for income tax on such salary when it was paid. This would be contra to the rule of the Lucas v. Earl case. That case involved a question of taxation of salary and the

problem here is whether to apply the rule of that case to such facts and compensation as is involved in this proceeding. It is worth while to compare the facts briefly.

In 1901 Earl agreed with his wife that any property either had or should acquire in the future should be treated as owned by them as joint tenants, and such property was to comprise earnings, salary, fees, or any rights in contracts and all the proceeds of such property. In 1920 and 1921 Earl received certain salary and fees and he claimed to be liable for income tax upon only one-half thereof. As for earnings, salary, and fees, such were Earl's property. They were the fruits of his work. The Supreme Court refused to separate the right he had to receive salary from the salary itself or from his work, i. e., to treat the salary as growing out of the contract between Earl and his wife. The Supreme Court did not regard the salary as money produced by the contractual right Earl's wife had obtained, but viewed it as growing out of Earl's services.

In this case the assignments were made in 1924 and 1928. The commissions in question were paid in 1933. The commissions were the fruits of petitioner's past work. We find no grounds here for treating the commissions as growing out of an interest in a contract of employment instead of out of petitioner's personal
28 services that could not have been found in the Lucas v. Earl case. But why not consider the similarities between this case and the Earl case? The subject there was salary; here, commissions. Both are compensation for personal services. Insurance commissions make up a large part of the compensation of an insurance agent, in addition to whatever salary he may receive. In a sense, the agent does not "earn" the commissions until third parties pay renewal premiums. No doubt the insurance companies regard the value of an agent's work in obtaining a new policy as dependent upon how long the policy is maintained. The insurance company elects to pay its agent for his work in obtaining the policy, on a commission basis, over a period of, usually, ten years, or for so long as the policy is maintained, up to ten years. Whether or not the commissions are ever paid depends on the ability of the insurance company to pay them, which in turn depends on whether policyholders pay renewal commissions. Likewise, whether future salary is ever to be paid depends upon the ability of the employer to pay the salary. Therefore, it seems reasonable to regard such commissions as we have here as in the same class with salary. Each is a form of compensation for personal service. Also, to resume the comparison between this case and the Earl case, the assignments made by petitioner in 1924 and 1928 were just as much an "anticipatory arrangement" as was the 1901 contract made by Earl. Here, petitioner anticipated that the

commissions would be paid. They were paid. He gave to another the right to collect and keep the premiums. In effect, Earl gave his wife the right to collect and keep one-half of his future salary. We think it should be concluded here that the commissions in question grew out of petitioner's services and not out of assigned interests in a chose in action, keeping in mind the fact that
29 we are dealing with an income tax question. We believe the doctrine of Lucas v. Earl is applicable here and that the rule of that case extends to commissions that are compensation for personal service and that tax on such commissions cannot be escaped by anticipatory arrangements devised to prevent such compensation from vesting in the person who earned them.

If it appears to be a troublesome factor in applying the doctrine of Lucas v. Earl that no further services of petitioner were required to entitle him to receive the commissions, it is nevertheless true that the commissions represented future compensation at the date of the assignments and they were, in a sense, not "earned" until they became payable. Further, where payments are for personal services, it need not be a determining factor, in deciding upon whom tax liability falls, that services have been fully performed. The rule, as we understand it, is that earned income is taxable to the earner. See Blair v. Commissioner, supra; cf. Daugherty v. Commissioner, 63 Fed. (2d) 77; Rossmoore v. Commissioner, 76 Fed. (2d) 520; Chicago Title & Trust Co., Executor, 33 B. T. A. 65; James M. Stokes, Jr., 22 B. T. A. 1386. The definition of gross income is broad and is to be considered in the light of the evident intent of Congress "to use its power to tax to the full extent." Douglas v. Willcuts, supra. If an earner of income may divest himself of earned income before it is payable, the intent of Congress to tax the earner of income is defeated at the start. Such assignments of future income in the guise of assigning some type of contractual right or an interest in a chose in action may become a device for withdrawing from the Government the benefit of graduated taxes and surtaxes applicable to income when concentrated in a single ownership. Cf. Burnet v. Wells, supra.
30 For purposes of income tax, we believe that earnings are in a separate class from other types of income, cf. Matchette v. Helvering, supra, and insurance commissions are a type of earnings.

It has been a guiding principle in the consideration of tax questions that taxation is not so much concerned with refin'ments of title as it is with the actual benefit for which the tax is paid. Corliss v. Bowers, 281 U. S. 376. And if the rule is made certain that earned income is taxable to the earner, no confusion need arise because in one case an earner assigns his right under a contract to future income and in another he assigns the bare, future income. The rule is bottomed upon the distinction between the source of

income earned by the performance of personal services and income produced by interests that clearly are property, separate from the person. Cf. Blair v. Commissioner, supra, where the Court points to a distinction between a beneficial interest and a chose in action. We agree with the conclusion reached in the Van Meter case, supra, that the rules of the Lucas v. Earl and the Corliss cases are opposed to the view expressed in the Hall v. Burnet case, and it is concluded here that while the earner of such commissions as we have here may in a legally binding way dispose of his future earnings, whether they are earned or are to be earned, he does not thereby affect his status as earner, or "his resulting liability for taxation thereon as income."

It is held that petitioner is taxable upon the commissions paid in the stipulated sum of $15,612.79. Respondent is sustained.

Reviewed by the Board.

Decision will be entered under Rule 50.

MURDOCK concurs only in the result.

ARUNDELL, LEECH, and ARNOLD dissent.

[SEAL]

31 Before United States Board of Tax Appeals, Washington

Docket No. 86200

Decision

Pursuant to the Findings of Fact and Opinion of the Board promulgated March 14, 1939, the respondent herein having on April 21, 1939, filed a recomputation and the petitioner having on April 26, 1939, filed an acquiescence therein, now therefore, it is

Ordered and decided: That there is a deficiency in income tax for the year 1933 in the amount of $751.92.

Enter: (Signed) MARION J. HARRON, *Member.*

Entered April 29, 1939.

32 In United States Circuit Court of Appeals for the Second Circuit

B. T. A. Docket No. 86200

Petition for review

Filed July 22, 1939

To the Honorable Judges of the United States Circuit Court of Appeals for the Second Circuit:

Now comes Gerald A. Eubank, by his attorneys, Harry J. Rudick and John D. Garrison, and hereby petitions for a review of the

determination of the United States Board of Tax Appeals promulgated in the above-entitled case on March 14, 1939, and of the final order and decision entered therein April 29, 1939, and respectfully shows to this Honorable Court as follows:

I

Petitioner is an individual. Petitioner is and was at all times during the calendar year 1933 a resident and citizen of the United States, having an office at 40 Wall Street, New York, N. Y. Petitioner duly filed an income-tax return for the year 1933 with the Collector of Internal Revenue for the Second District of New York, whose office is located at the Custom House in the Borough of Manhattan, City, County, and State of New York, within the jurisdictional limits of the United States Circuit Court of Appeals for the Second Circuit.

33 The respondent on review (hereinafter referred to as the "Commissioner") is the duly qualified and acting Commissioner of Internal Revenue of the United States, holding his office by virtue of the laws of the United States.

II

The Commissioner determined a deficiency in petitioner's income tax for the calendar year 1933 and mailed to petitioner a notice of such deficiency dated August 4, 1936. On August 21, 1936, petitioner filed with the United States Board of Tax Appeals a petition for the redetermination of such deficiency which received Docket No. 86200. Respondent filed an answer on September 28, 1936. Motion for circuit hearing in New York, N. Y., was granted on October 8, 1936, and hearing was held in New York, N. Y., on December 7, 1937, before Honorable Marion J. Harron. The United States Board of Tax Appeals promulgated its opinion on March 14, 1939 (39 B. T. A. No. 76), and, in accordance with the determination contained therein, made and entered on April 29, 1939, its final order and decision that there is a deficiency in petitioner's income tax for the year 1933 in the amount of $751.92.

III

The nature of the controversy is as follows:

Prior to November 24, 1924, petitioner had been branch manager in Michigan for The Canada Life Assurance Company under a contract which had terminated prior to that date, except for the payment of certain commissions on life insurance renewal premiums (hereinafter referred to as "renewal commissions"). On

November 24, 1924, petitioner assigned to Union Trust Com-
34 pany (subsequently Union Guardian Trust Company), Detroit, Michigan, all his right, title, and interest in said contract, together with any moneys that might become payable thereunder.

Prior to March 28, 1928, petitioner had been general agent in New York City for Aetna Life Insurance Company under a contract which, except for the payment of renewal commissions, had terminated prior to that date. On March 28, 1928, petitioner assigned to said Union Trust Company all commissions which might become due him under said contract and all his right, title, and interest therein.

In 1933, by virtue of the assignments hereinabove mentioned, the two insurance companies paid to petitioner's assignee, Union Guardian Trust Company, renewal commissions amounting to $15,612.79. The Commissioner, in his notice of deficiency referred to above, included in petitioner's income for the year 1933 said renewal commissions.

The petitioner contended in his appeal to the United States Board of Tax Appeals that such renewal commissions, having been paid to his assignee pursuant to the assignments hereinbefore mentioned, were not income to petitioner, and, accordingly, were not required to be included in his taxable income for the year involved.

The United States Board of Tax Appeals sustained the determination of the Commissioner and ordered and decided that there was a deficiency in petitioner's income tax for the year 1933 in the amount of $751.92.

IV

Petitioner states that in the decision and final order of the United States Board of Tax Appeals manifest errors occurred to petitioner's prejudice. Petitioner assigns the following errors:

35 1. The Board erred in failing to find the facts as stipulated by the parties.

2. The Board erred in holding (a) that The Canada Life Assurance Company and Aetna Life Insurance Company did not accept in writing the assignments by petitioner under dates of November 24, 1924, and March 28, 1928, to Union Trust Company referred to above; (b) that said insurance companies were not legally obligated to pay such renewal commissions to Union Trust Company as petitioner's assignee; and (c) that petitioner, after making such assignments, was still entitled to collect the renewal commissions payable under his terminated contracts with said companies.

3. The Board erred in holding that The Canada Life Assurance Company and Aetna Life Insurance Company had the right to change the rates at which renewal commissions should be paid under his contracts with said insurance companies.

4. The Board erred in holding that petitioner had no matured property rights under said contracts to assign and divest himself of in 1924 and 1928, respectively, and that accordingly no legal title to renewal commissions, payable after such assignments, was conveyed to Union Trust Company, as petitioner's assignee, in 1924 and 1928, pursuant to said assignments.

5. The Board erred in deciding that such renewal commissions paid in 1933 to Union Guardian Trust Company as petitioner's assignee were income to petitioner and in ordering and deciding that there is a deficiency in petitioner's income tax for the year 1933 in the amount of $751.92.

36 6. The Board erred in failing to decide that such renewal commissions were not income to petitioner.

7. The Board erred in failing to order and decide that there is no deficiency in petitioner's income tax for the year 1933.

Wherefore, petitioner prays that the action of the United States Board of Tax Appeals in this case be reviewed by this Court; that the order and decision of the United States Board of Tax Appeals be reversed; that appropriate action be taken to the end that the errors complained of be reviewed and corrected by this Court and that petitioner be granted such other and further relief as may to this Court appear proper in the premises.

Respectfully submitted.

(S) HARRY J. RUDICK,
(S) JOHN D. GARRISON,
Counsel for Petitioner,
25 Broadway, New York, N. Y.

37 [*Duly sworn to by Harry J. Rudick and John D. Garrison; jurats omitted in printing.*]

38 In United States Circuit Court of Appeals for the Second Circuit

B. T. A. Docket No. 86200

Notice of filing petition for review

Filed July 26, 1939

SIR: Please take notice that the undersigned have this day filed with the United States Board of Tax Appeals on behalf of the

petitioner in the above-entitled case a petition for review by the United States Circuit Court of Appeals for the Second Circuit of the determination of the United States Board of Tax Appeals, promulgated on March 14, 1939, and of the final order and decision entered therein on April 29, 1939. A copy of the petition for review and assignments of error as filed is attached hereto and served upon you.

Dated, July 21, 1939.

(S) HARRY J. RUDICK,
(S) JOHN D. GARRISON,
Counsel for Petitioner.

To COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C.

Service of a copy of the foregoing notice of filing, together with one copy of the petition for review and assignments of error is acknowledged this 22nd day of July 1939.

(S) J. P. WENCHEL,
Chief Counsel, Bureau of Internal Revenue,
Counsel for Respondent.

39 In United States Circuit Court of Appeals for the Second Circuit

B. T. A. Docket No. 86200

Agreement substituting stipulation of facts for statement of evidence

Filed August 2, 1939

This proceeding was submitted to the United States Board of Tax Appeals for decision on the pleadings and a stipulation of facts. Petitioner alleges as his first assignment of error in the petition for review by the Circuit Court of Appeals for the Second Circuit that the Board erred in failing to find the facts as stipulated by the parties. In lieu of filing a statement of evidence, the petitioner and respondent hereby agree that the stipulation of facts submitted to the Board be made a part of the record on appeal herein.

Dated, July 29, 1939.

(S) HARRY J. RUDICK,
(S) JOHN D. GARRISON,
Counsel for Petitioner.
J. P. WENCHEL,
Counsel for Respondent.

40 Before United States Board of Tax Appeals

Docket No. 86200

Stipulation of facts

Filed December 7, 1937

The parties hereto by their respective counsel of record hereby stipulate the following facts for the purpose of this action, without prejudice, however, to the right of either party to introduce further evidence not inconsistent with the facts stipulated herein.

1. Petitioner and one Hugh D. Hart, under the firm name of Hart & Eubank, were appointed general agents in New York City for the Aetna Life Insurance Company by a contract dated August 20, 1924, and effective September 1, 1924, a copy of which is attached hereto, marked Exhibit A, and made a part hereof.

2. The agency of Hart & Eubank was terminated as of June 30, 1927, and petitioner, as a member thereof, became entitled to one-half of whatever renewal commissions became payable subsequent to June 30, 1927, under the contract (Exhibit A) referred to in the preceding paragraph. Thereafter, neither petitioner nor said Hart was obligated to perform any further services in order that petitioner should become entitled to said renewal commissions.

3. Petitioner was appointed as general agent in New
41 York City for the Aetna Life Insurance Company effective July 1, 1927, by a contract dated June 28, 1927, a copy of which is attached hereto, marked Exhibit B, and made a part hereof.

4. Petitioner on July 19 resigned the general agency granted by the contract referred to in paragraph 3, said resignation to take effect September 30, 1927. The Aetna Life Insurance Company appointed one R. H. Keffer as general agent to take the place of petitioner after the effective resignation date set forth above, i. e., September 30. Said Keffer approached petitioner and offered petitioner $12,000 if petitioner would make the effective date of his resignation August 31, 1927, instead of September 30, 1927—petitioner's rights to renewal commissions on business written prior to August 31, 1927, to remain unaffected. In other words, for the privilege of taking over the agency a month in advance of the scheduled time, Keffer was willing to pay $12,000. Petitioner accepted Keffer's offer and received from him $12,000, which was reported as taxable income in petitioner's 1927 income-tax return.

5. Thereafter, i. e., after August 31, 1927, petitioner was not required to render any further services whatsoever in order to

become entitled to the renewal commissions provided for by the agency contract, attached hereto as Exhibit B.

6. On March 28, 1928, petitioner executed and delivered to the Union Trust Company (subsequently Union Guardian Trust Company) of Detroit, Michigan, a certain instrument, a copy of which is annexed hereto marked Exhibit C, and made a part hereof. A copy of the Aetna Life Insurance Company's letter dated April 28, 1928, relating to said instrument is attached thereto.

42 7. Petitioner was appointed by The Canada Life Assurance Company as its branch manager for the State of Michigan by a contract dated January 22, 1924, effective January 1, 1924, a copy of which is attached hereto, marked Exhibit D, and made a part hereof.

8. Said contract with The Canada Life Assurance Company was terminated as of September 1, 1924, and thereafter petitioner became entitled to renewal commissions thereunder.

9. On November 24, 1924, petitioner executed and delivered to the Union Trust Company (subsequently Union Guardian Trust Company) a certain instrument, a copy of which is annexed hereto, marked Exhibit E, and made a part hereof. A copy of The Canada Life Assurance Company's acknowledgment under date of December 3, 1924, of the receipt of said instrument is attached thereto.

10. During the year 1933 said Union Guardian Trust Company, by virtue of the instruments referred to in paragraphs 6 and 9 (Exhibits C and E) received renewal commissions payable under the provisions of the agency contracts referred to herein (Exhibits A, B, and D) as follows:

From Aetna Life Insurance Company Hart & Eubank Contract	$12,354.16
From Aetna Life Insurance Company Eubank Contract	591.47
From The Canada Life Assurance Company	2,667.16
	$15,612.79

43 No part of these renewal commissions was due prior to the termination of the agency contracts as hereinbefore set forth.

11. The total amount of renewal commissions received by said Union Guardian Trust Company during the year 1933 under the aforementioned contracts (Exhibits A, B, and D) was $15,612.79, as indicated in the preceding paragraph, rather than $17,207.94, as indicated on page 2 of the deficiency notice.

HARRY J. RUDICK,
Counsel for Petitioner.

(Signed) J. P. WENCHEL,
Chief Counsel, Bureau of Internal Revenue,
Counsel for Respondent.

Exhibit A

This agreement, made in the City of Hartford, State of Connecticut, this 20th day of August, A. D. 192—, between the Aetna Life Insurance Company of said Hartford, Party of the First Part, and Hugh D. Hart & Gerald A. Eubank (of Little Rock, Arkansas) (of Detroit, Michigan) (doing business under the firm name of Hart & Eubank) Parties of the Second Part, witnesseth, That in consideration of agreements hereinafter made by the said parties of the second part they are hereby ap-
44 pointed by said party of the first part its General Agents for the territory designated below—to procure application for life insurance for said party of the first part in said territory, to receive premiums upon all Policies issued upon such applications, and to collect premiums upon renewals of the same.

Said party of the first part reserves the right to discontinue the writing of new business in the said territory, should the legislation of any State or the interpretation of existing laws respecting the business of insurance companies of other States be deemed by said party of the first part prejudicial to its interests.

Said party of the first part also reserves the right to change the rates of commissions payable to the said parties of the second part (if in its judgment the conditions require such action) on any or all of the plans of insurance embodied in this contract or that may hereafter be adopted, by giving to said parties of the second part sixty days' notice to that effect, in writing.

The commissions payable on premiums for the first year of insurance shall be determined by the Company's regular first-year commission schedule attached hereto, and any modifications of or additions thereto of subsequent date.

This appointment shall cover the following territory, namely: The City of Greater New York, but not to the exclusion of other agents.

47 RENEWAL COMMISSIONS

Said party of the first part further agrees, that on the business secured under this Contract on all plans of insurance except those which specifically provide for no renewal commissions there shall be payable to said parties of the second part, while this Contract remains in full force and effect, the following commissions:

Seven and one-half percent (7½%) of the premiums paid and reported during the second and subsequent eight years of insurance (9 renewals), except that Five percent (5%) only will be allowed on all Term policies and on all forms of Endowment calling for premiums during less than twenty years.

FIRST-YEAR COMMISSION SCHEDULE

(Participating and Non-Participating)

45

LIFE PLANS*

Life Annual Payment	50%
Life Annual Payment (Over Age 65)	30%
Life Annual Payment (Accumulative)	50%
Life Annual Payment (Monthly Income)	50%
Life Annual Payment (Prin. & 6% In.)	50%
Life Annual Payment (Partnership)	40%
Life 20 Payments	45%
Life 20 Payments (Progressive)	45%
Life 20 Payments (Mo. Income)	45%
Life 20 Payments (Prin. & 6% In.)	45%
Life 20 Payments (Partnership)	40%
Life 15 Payments	40%
Life 10 Payments	30%
Life 10 Payments (Over Age 65)	10%
Life Single Payment	5%

DEFERRED ANNUITIES and INCOME BONDS

25 or more Premium Payments	30%
20 to 24 Premium Payments	25%
15 to 19 Premium Payments	20%
10 to 14 Premium Payments	15%
5 to 9 Premium Payments	10%

*ORDINARY LIFE WITH TERM INSURANCE DURING FIRST FIVE YEARS

TERM PREMIUMS	Up to Age 50	40%
	Age 51 and over	25%

(Renewal Com. same rate as Annual Life, and when policy converts to that plan the first year and renewal commissions applicable to that plan at that time will then be payable.)

ENDOWMENT PLANS

	Ann. Pay	20 Pay	10 Pay
35 Year End't	45%	40%	30%
30 Year End't	40%	35%	30%
25 Year End't	35%	30%	20%
20 Year End't	35%	....	20%
20 Year End't (Progressive)	35%	....	....
20 Year End't (Mo. Income)	35%	....	....
20 Year End't (Partnership)	35%	....	....
15 Year End't	30%	....	20%
10 Year End't	20%	....	....
10 Year End't (Over Age 65)	12½%	....	....
Endowment Single Payment			5%

Deferred Endowments same commissions as nearest regular Endowment.

INSURANCE WITH LIFE INCOME AT STATED AGES

PREMIUMS PAYABLE DURING WHOLE TERM

	Insurance with Life Income at				
Age at issue	Age 50	Age 55	Age 60	Age 65	Age 70
16 — 17	45%	45%	45%	50%	50%
18 — 22	40%	45%	45%	45%	50%
23 — 27	35%	40%	45%	45%	45%
28 — 32	35%	35%	40%	45%	45%
33 — 37	30%	35%	35%	40%	45%
38 — 42	30%	30%	35%	35%	40%
43 — 47	*10%	30%	30%	35%	35%
48 — 52	....	*10%	30%	30%	35%
53 — 57	....	....	*10%	30%	30%
58 — 62	....	....	....	*10%	30%
63 — 65	....	....	....	....	*10%

*Limited to Endowment Terms of not less than five years.

PREMIUMS PAYABLE DURING 20 YEARS

Commissions 5% less than provided above for corresponding age and plan.

(Principal and Income Bond, also Insurance with Continuous Income, same commissions as are called for under Insurance with Life Income at Stated Ages.)

TERM

One Year, Renewable 9 years	30%
7 Year, Renewable	35%
All other Term plans	25%

*SINGLE PAYMENT ANNUITIES

Regular Plans, Premiums of $50,000 or less, 5%; Over $50,000 and not exceeding $100,000, 5% on first $50,000 and 4% on excess; Over $100,000, 5% on first $50,000, 4% on next $50,000 and 3% on excess. On special plans the above rates will not apply.

* In determining the amount, all premiums due under single payment annuities on the same life within

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COLLECTION FEES

Five percent (5%) of the premiums paid and reported during the eleventh and subsequent four years of insurance, and Three percent (3%) thereafter, as a Collection Fee, while the Contract remains in full force and effect, on policies on which renewal commissions have been payable as above.

Said party of the first part further agrees to pay all authorized charges for physicians' fees, postage, exchange, express charges on packages of agency supplies, and the taxes and license fees not higher than now required by State law—proper vouchers being furnished for all such expenditures.

Said party of the first part further agrees, to furnish such stationery, blanks, and printed matter as it may consider necessary in the conduct of its business.

48 This agreement further witnesseth, that said parties of the second part hereby accept the agency of said party of the first part—and agree that they will devote their entire time and energy to the business of said party of the first part and to no other; that they will not engage in nor give any time to any other business whatever during the continuance of this Contract; and that they will employ a sufficient number of agents to canvass the territory named, and see that the party of the first part is represented therein by efficient, active agents.

Said parties of the second part further agree, that they will be responsible to the said party of the first part for the premiums and deposits upon all Policies, and Deposit and Renewal Receipts, sent to them by the party of the first part, and for all interest collected by them on premium notes and policy loans; and, that they will account to said party of the first part on or before the last day of each month or at any other time when required, for all premiums, deposits, and interest received by them or their agents, depositing to the credit of or remitting to said party of the first part in New York funds the amount of same less such charges as they may be entitled to under this Contract.

Said parties of the second part further agree, that they will give a Bond to said party of the first part, in the sum of Twenty Thousand Dollars ($20,000.00), with good and satisfactory surety, and that they will renew or increase the same as may be required by said party of the first part.

Said parties of the second part further agree, that the agency books, records, and papers shall be kept in the manner prescribed by, and that they shall be the property of, said party of the first part, subject to its inspection and control at any and all times; and, that the business shall be conducted in all respects in accordance with the instructions of said party of the first part.

49 Said parties of the second part further agree, that any Accident, Health, or Liability Insurance written by them or their agents shall be placed in the Ætna Life Insurance Company through the regular authorized agents of the Accident & Liability Department in said territory.

It is hereby understood and agreed that all contracts or agreements with subagents involving the payment of renewal commissions shall be executed in triplicate on the forms furnished by the party of the first part, and that such contracts or agreements shall not go into full force and effect until approved by an executive officer of said party of the first part.

It is further understood and agreed, that no assignment, transfer, or disposal of said agency or business, or any interest whatever therein can be made without the consent and approval of said party of the first part, in writing.

It is further understood and agreed that if the conditions hereof or agreements herein made by said parties of the second part are not fully complied with the agreements made by said party of the first part shall be wholly null and void.

It is further understood and agreed that the Cashier at said agency shall be the cashier of said party of the first part; that his appointment shall be subject to the approval of, and that he shall at all times be under the control and direction of said party of the first part; and that said Cashier shall have charge of the collection of all moneys due said party of the first part in connection with the business of said agency, and that he shall be required to countersign all checks for the disbursement of agency funds.

50 It is further understood and agreed that this contract may be terminated by either party giving to the other at least sixty (60) days' notice to that effect, in writing.

In event of the termination of this contract, either as above or by the death of either of the parties of the second part, then provided none of the conditions or agreements thereof has been violated by said parties of the second part, the party of the first part hereby agrees that at the end of each Three (3) Months after said termination there shall be payable to said parties of the second part (or their estates) commissions on the premiums actually collected during said three months on business secured under this Contract prior to such termination on which the parties of the second part would have been entitled to renewal commissions in event of its continuance, as follows:

The commissions hereinbefore specified for the first ten years of insurance, less a charge for collecting same of two percent (2%) of the premiums on said business, and less any indebtedness to said party of the first part, and less also any commissions payable to subagents under written contracts in force at the time of such ter-

mination—said party of the first part assuming the payment of all commissions to said subagents as they may become due under such contracts, not in excess of those above agreed to be paid to said parties of the second part in event of the termination of this Contract.

Said parties of the second part hereby agree that the above-described settlement shall be accepted in full compensation for their interest in the agency hereby conveyed.

This Contract is to take effect and become operative on the
51 1st day of September A. D. 1924, and is to govern only the business secured on and after that date through the agency of said parties of the second part. Executed at Hartford, State of Connecticut, this 20th day of August A. D. 1924.

Witness: ÆTNA LIFE INSURANCE COMPANY,
ROLAND F. FAY. By K. A. LUTHER, *Agency Secretary.*
ROLAND F. FAY. HUGH D. HART.
ROLAND F. FAY. GERALD A. EUBANK.

Exhibit B

This agreement, made in the City of Hartford, State of Connecticut, this 28th day of June A. D. 1927, between the Aetna Life Insurance Company of said Hartford, Party of the First Part, and Gerald A. Eubank, of the City of Orange, State of New Jersey, Party of the Second Part.

Witnesseth, that in consideration of agreements hereinafter made by the said party of the second part he is hereby appointed by the said party of the first part its General Agent for the territory designated below—to procure applications for life insurance for said party of the first part in said territory, to
52 receive premiums upon all Policies issued upon such applications, and to collect premiums upon renewals of the same.

Said party of the first part reserves the right to discontinue the writing of new business in the said territory, should the legislation of any State or the interpretation of existing laws respecting the business of insurance companies of other States be deemed by said party of the first part prejudicial to its interests.

Said party of the first part also reserves the right to change the rates of commissions payable to the said party of the second part (if in its judgment the conditions require such action) on any or all of the plans of insurance embodied in this contract or that may hereafter be adopted, by giving to said party of the second part sixty days' notice to that effect in writing.

The commissions payable on premiums for the first year of insurance shall be determined by the Company's regular first-year

commission schedule attached hereto, and any modifications of or additions thereto of subsequent date.

This appointment shall cover the following territory, namely:

The City of Greater New York, including Staten Island, but not to the exclusion of other agents.

55 RENEWAL COMMISSIONS

Said party of the first part further agrees, that on the business secured under this Contract on all plans of insurance except those which specifically provide for no renewal commissions there shall be payable to said party of the second part, while this Contract remains in full force and effect, the following commissions:

Seven and one-half per cent. (7½%) of the premiums paid and reported during the second and subsequent eight years of insurance (9 renewals), except that Five per cent. (5%) only will be allowed on all regular Term policies and on all forms of Endowment calling for premiums during less than twenty years.

COLLECTION FEES

On renewal premiums for the second year of insurance, five per cent. (5%), and on the renewal premiums for the eleventh and all subsequent years, two and one-half per cent. (2½%) as a collection fee while the Contract remains in full force and effect, on policies on which renewal commissions have been payable as covered by that provision of the Contract. (The collection fee of five per cent. (5%) for the second year shall not apply on policies calling for premiums during less than fifteen years.)

Said party of the first part further agrees, to pay all authorized charges for physicians' fees, postage, exchange, express charges on packages of agency supplies, and the taxes and license fees not higher than now required by State law—proper vouchers being furnished for all such expenditures.

Said party of the first part further agrees, to furnish such stationery, blanks and printed matter as it may consider necessary in the conduct of its business.

56 This agreement further witnesseth, that said party of the second part hereby accepts the agency of said party of the first part—and agrees that he will devote his entire time and energy to the business of said party of the first part and to no other; that he will not engage in nor give any time to any other business whatever during the continuance of this Contract; and, that he will employ a sufficient number of agents to canvass the territory named, and see that the party of the first part is represented therein by efficient, active agents.

FIRST-YEAR COMMISSION SCHEDULE

(Participating and Non-Participating)

(For Ages Over 65 See Note)

LIFE PLANS

	Whole Term	30 Pay.	25 Pay.	20 Pay.	15 Pay.	10 Pay.
Life	50%	45%	45%	45%	40%	30%
Modified Life	40%	(In 6th policy year 60% of increase in the premium)				
Accumulative	50%	....	....	....	....	....
Monthly Income	50%	....	....	45%	....	....
Principal & 6% Income	50%	....	....	45%	....	....
Progressive (2½ & 5%)	....	....	....	45%	....	....
Partnership	40%	....	....	40%	....	....

ENDOWMENT PLANS

	Whole Term	20 Pay.	10 Pay.
35 Year End't	45%	40%	30%
30 Year End't	40%	35%	30%
25 Year End't	35%	30%	20%
20 Year End't	35%	....	20%
20 Year End't (Progressive)	35%	....	....
20 Year End't (Mo. Income)	35%	....	....
20 Year End't (Partnership)	35%	....	....
15 Year End't	30%	....	20%
10 Year End't	20%	....	....

Deferred Endowments same commissions as nearest regular Endowment.

CONTINUOUS INCOME AND INSURANCE WITH LIFE INCOME AT STATED AGES

PREMIUMS PAYABLE DURING WHOLE TERM

Age at issue	Insurance with Life Income at Age 50	Age 55	Age 60	Age 65	Age 70
16 — 17	45%	45%	45%	50%	50%
18 — 22	40%	45%	45%	45%	50%
23 — 27	35%	40%	45%	45%	45%
28 — 32	35%	35%	40%	45%	45%
33 — 37	30%	35%	35%	40%	45%
38 — 42	20%	30%	35%	35%	40%
43 — 47	*10%	20%	30%	35%	35%
48 — 52	....	*10%	20%	30%	35%
53 — 57	....	....	*10%	20%	30%
58 — 62	....	....	....	*10%	20%
63 — 65	....	....	....	....	*10%

*Limited to Endowment Terms of not less than five years.

PREMIUMS PAYABLE DURING 20 YEARS

Commissions 5% less than provided above for corresponding age and plan.

TERM PLANS

One Year, Renewable 9 years	20%
7 Year, Renewable	35%
Special 5 Year (Non-Renewable)	
Up to Age 50	40%
Age 51 and over	25%
All other term plans	25%

DEFERRED ANNUITIES and INCOME BONDS

25 or more Premium Payments	30%
20 to 24 Premium Payments	25%
15 to 19 Premium Payments	20%
10 to 14 Premium Payments	15%
5 to 9 Premium Payments	10%

SINGLE PAYMENT

Insurances	5%
Annuities	3%

NOTE — Commissions on policies issued above age 65 on all Plans except Single Payment will be the same in dollars and cents as for a policy issued at age 65. In cases where an extra premium is being charged, resulting in a premium higher than the regular premium for age 65, the commissions allowed will be the same in dollars and cents as for a policy issued on a standard life at age 65.

Under the terms of your contract the above ruling is of course subject to revision at any time as may be deemed advisable by the Company.

Where case is rated up in age and commission is based on age, rated up age will govern.

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Said party of the second part further agrees, that he will be responsible to the said party of the first part for the premiums and deposits upon all Policies, and Deposit and Renewal Receipts, sent to him by the party of the first part, and for all interest collected by him on premium notes and policy loans; and, that he will account to said party of the first part on or before the last day of each month or at any other time when required, for all premiums, deposits, and interest received by him or his agents, depositing to the credit of or remitting to said party of the first part in New York funds the amount of same less such charges as he may be entitled to under this Contract.

Said party of the second part further agrees, that he will give a Bond to said party of the first part, in the sum of Ten Thousand Dollars ($10,000) with good and satisfactory surety, and that he will renew or increase the same as may be required by said party of the first part.

Said party of the second part further agrees, that the agency books, records, and papers shall be kept in the manner prescribed by, and that they shall be the property of, said party of the first part, subject to its inspection and control at any and all times; and, that the business shall be conducted in all respects in accordance with the instructions of said party of the first part.

57 Said party of the second part further agrees, that any Accident, Health, or Liability Insurance written by him or his Agents shall be placed in the Aetna Life Insurance Company through the regular authorized agents of the Accident & Liability Department in said territory.

It is hereby understood and agreed, that all contracts or agreements with sub-agents involving the payment of renewal commissions shall be executed in triplicate on the forms furnished by the party of the first part, and that such contracts or agreements shall not go into full force and effect until approved by an executive officer of said party of the first part.

It is further understood and agreed, that no assignment, transfer, or disposal of said agency or business, or any interest whatever therein, can be made without the consent and approval of said party of the first part, in writing.

It is further understood and agreed that if the conditions hereof or agreements herein made by said party of the second part are not fully complied with, the agreements made by said party of the first part shall be wholly null and void.

It is further understood and agreed, that the Cashier at said agency shall be the cashier of said party of the first part; that his appointment shall be subject to the approval of, and that he shall at all times be under the control and direction of, said party

of the first part; and, that said Cashier shall have charge of the collection of all moneys due said party of the first part in connection with the business of said agency, and that he shall be required to countersign all checks for the disbursement of agency funds.

It is further understood and agreed that this contract may be terminated by either party giving to the other at least sixty (60) days' notice to that effect, in writing.

58 In event of the termination of this Contract, either as above or by the death of the party of the second part, then provided none of the conditions or agreements thereof has been violated by said party of the second part, the party of the first part hereby agrees that at the end of each Three (3) Months after said termination there shall be payable to said party of the second part (or his estate) commissions on the premiums actually collected during said three months on business secured under this Contract prior to such termination on which the party of the second part would have been entitled to renewal commissions in event of its continuance, as follows:

The commissions hereinbefore specified for the first ten years of insurance, less a charge for collecting same of one and one-half per cent. (1½%) of the premiums on said business, and less any indebtedness to said party of the first part, and less also any commissions payable to sub-agents under written contracts in force at the time of such termination—said party of the first part assuming the payment of all commissions to said sub-agents as they may become due under such contracts, not in excess of those above agreed to be paid to said party of the second part in event of the termination of this Contract.

Said party of the second part hereby agrees that the above described settlement shall be accepted in full compensation for his interest in the agency hereby conveyed. This Contract is to take effect and become operative on the First day of July A. D. 1927, and is to govern only the business secured on and after that date through the agency of said party of the second part. Executed at Hartford, State of Connecticut, this 28th day of June A. D. 1927.

ÆTNA LIFE INSURANCE COMPANY,
By K. A. LUTHER, *Vice President.*
GERALD A. EUBANK.

Witness:
ROLAND F. FAY.
M. ———(illegible).

59 *Exhibit C*

Know all men by these presents, that I, Gerald A. Eubank, of South Orange, County of Essex, State of New Jersey, am the same person who with Hugh D. Hart under the firm name of Hart & Eubank was appointed by the Aetna Life Insurance Company of Hartford, Connecticut, as General Agent for said Company in New York City under written appointment which was executed at Hartford, State of Connecticut, the 20th day of August A. D. 1924 and which took effect on the 1st day of September A. D. 1924; and I am the same person who was appointed General Agent by said Company as successor to said Hart & Eubank to represent said Company as General Agent in New York City, under written appointment which was executed at Hartford, State of Connecticut, the 28th day of June A. D. 1927, and which took effect on the 1st day of July A. D. 1927.

Now, in consideration of the sum of One Dollar ($1.00) and other good and valuable considerations, the receipt whereof is hereby acknowledged, I do hereby sell, transfer, and set over unto the Union Trust Company, Detroit, Michigan, Trustee, all commissions now due me or to become due me under or on account of and subject to the terms and conditions of said appointments or amendments thereto and all right, title, and interest therein which I now have or may have at any future time, hereby waiving all right or title to and interest in said appointments or amendments thereto and authorizing and requesting said Company to pay all said commissions to the said Union Trust Company, Trustee, which is hereby authorized to receipt and discharge the same in full.

I do also hereby sell, assign, transfer, and set over unto the
60 said Union Trust Company, Trustee, all my interest in commissions on Group and Wholesale business as covered by individual agreements under each policy placed through the General Agencies of Hart & Eubank and/or G. A. Eubank, that may be now due or to become due me from said Aetna Life Insurance Company and all right, title, and interest therein which I now have or may have at any future time, hereby waiving all right or title to and interest in said commissions and authorizing and requesting said Company to pay all said commissions to the said Union Trust

Company, Trustee, which is hereby authorized to receipt and discharge the same in full.

In witness whereof, I have hereunto executed this assignment, release, and waiver in triplicate, under seal, at New York, State of New York, this 28th day of March A. D. 1928.

Signed, sealed, and delivered Gerald A. Eubank in the presence of
C. E. ANDERSON

STATE OF NEW YORK,
County of New York, ss.

On this 28th day of March A. D. 1928 before me, the undersigned, appeared Gerald A. Eubank, personally known to me, and duly acknowledged the execution of the above instrument.

JNO. A. DELEYER,
Notary Public.

Notary Public, Bronx County. Certificate filed in N. Y. Co. No.
(Notarial Seal)

61 AETNA LIFE INSURANCE COMPANY,
Hartford, Connecticut, April 12, 1928.

UNION TRUST COMPANY,
Detroit, Michigan.

GENTLEMEN: We have received from Mr. Gerald A. Eubank and placed on file copy of an assignment executed by him in favor of the Union Trust Company, trustee, covering all of Mr. Eubank's commission interests under said contracts and amendments thereto with this Company as named in the assignment.

The Aetna Life Insurance Company does not guarantee the sufficiency or validity of any assignment and in placing this assignment on file it must be understood that the Company does not waive any of its rights under the contracts or amendments thereto.

Checks will be forwarded from the Home Office to the Union Trust Company covering commissions as they accrue according to the terms of the contracts. There will also be checks from time to time sent the Union Trust Company from the Company's Cashier in New York City covering various items which are being collected by him.

Very truly yours,

K. A. LUTHER, *Vice President.*

K. A. Luther.
RFF.

EXHIBIT "D"

BRANCH MANAGER'S CONTRACT

62

This Agreement made in duplicate this 22nd day of January, 19 26.

to take effect the 1st day of January, 19 26., between THE CANADA LIFE ASSURANCE COMPANY, party of the first part, hereinafter called the Company, and Donald A. Robert

of Detroit, Michigan of the second part, hereinafter called the Branch Manager.

Witnesseth, That the Company doth hereby appoint the said party of the second part as its Branch Manager for The State of Michigan for the purpose of canvassing for and procuring applications for insurance on the lives of individuals with the said Company, and for such other duties as the Company may require, and that this appointment is made on the following terms and conditions, which are mutually agreed to.

COMPENSATION

The Branch Manager shall be allowed the following compensation for his services under this agreement:

A. FIRST YEAR COMMISSIONS.

Upon first year premiums, during the continuance of this Agreement, to be obtained, collected, paid to and received by the Company on policies effected by or through the Branch Manager, commissions shall be paid as per the percentage shown in the following Schedule.

PLAN	WITH PROFIT		WITHOUT PROFIT Per Cent
Whole Life Continuous Annual Premiums	[illegible]	[illegible]	40
" " 20, 25 and 30 Annual Premiums			35
" " 15 Annual Premiums			30
" " 10 "			25
Endowment 30 years or more, Continuous Annual Premiums			35
" 20 and 25 years " " "			30
" 15 years " " "			25
" 10 " " " "			20
" 20 years, 20 Annual Premiums			30
Twenty-Year Capital Return			35
Endowment 15, 20, 25, 30 years, 10 Annual Premiums			30
" at Ages 65 and 75, 20 or more Annual Premiums			25
" " " " 20-29 " "			20
" " " " 18-19 " "			15
" " " " 15-17 " "			10
" " " " 13-14 " "			5
" " " " 10-12 " "			3
Guaranteed Premium Reduction			5
Term Policies, 5 Year Term, convertible within 4 years			5
" " 10 " " " 8 "			5
Single Premiums	5	4	3½

1. Pension and Dual Pension Policies shall receive the same rate as corresponding Endowment policies of the same duration, payable in one sum.
2. Joint Life and Endowment Plans shall receive 10% less than rates on corresponding plans, single life.
3. No commissions shall be allowed on extra premiums for residence or occupation.
4. Rate of commission on Double Endowments and Pure Endowments to be four-fifths of the rate on corresponding similar plans.
5. Where a policy is issued on a life previously assured in the Company under a policy which has been surrendered or allowed to lapse, then commission in respect of the first year's premium on the new policy shall be determined by the Company.

B. RENEWAL COMMISSIONS.

A renewal commission of seven and one-half per cent. (7½%) on With Profit Premiums and two and one-half per cent. (2½%) on Without Profit Premiums on policies (except Endowment policies requiring less than fifteen annual premiums) secured by or through the said Branch Manager under the terms of this Agreement as the said premiums are paid for in cash to the Company, shall be paid for a period of nine (9) years, provided this Agreement continues in force for such nine year period. On Endowment policies requiring less than fifteen annual premiums the renewal commission shall be five per cent. (5%) on With Profit Premiums and two and one-half per cent. (2½%) on Without Profit Premiums. No commission shall be allowed on premiums advanced under the Automatic Non-Forfeiture privilege until such premiums so advanced are paid in cash, nor shall commissions be allowed upon premiums on policies which lapse for more than 90 days from expiration of the days of grace unless the reinstatement of the said policies is effected by or through the assistance of the Agent.

These renewal commissions are subject to Condition No. 9 and to General Conditions regarding compensation.

This Clause also covers all policies produced under the terms of the previous agreement dated the 1st day of January, 1924, between the parties hereto.

C. RENEWAL COMMISSIONS PAYABLE AFTER DEATH AND DISABILITY BENEFIT.

Provided the Agreement [illegible] the Branch Manager or his estate will be allowed, in the event of the termination of this Agreement, by death or causes other than by the violation of the terms of this Agreement, the renewal commissions above referred to in Clause B, under "Compensation" for the balance of the said nine year period subject to the conditions of this Agreement, less any indebtedness on the part of the Branch Manager to the Company, and less a collection charge of one per cent. (1%) of the premiums. Settlement hereunder to be made quarterly. It is further agreed, however, that should any Term Policy written under this said Agreement be converted [illegible] by another representative of the Company after such termination of this Agreement, no further

DEFINITIONS.

The "Contract Year" shall be the calendar year. During the portion of the calendar year in which this Agreement becomes effective, credit shall be given *pro rata* for the "Issued and Paid-for New Business" up to 31st December of that year.

In reckoning "Issued and Paid-for New Business" credit for policies effected shall be given only in the year in which the premiums for the same are paid in cash to the Company, and shall be reckoned as follows: Where the full annual premium is paid in the "Contract Year," the credit shall consist of the full sum assured; where the premium paid is half-yearly, quarterly or for a broken period of such broken period is for three months or over) the credit shall be based on the *pro rata* amount of the sum assured. Term business shall not count, but term business converted from commencement or attained age shall count in the year in which the conversion takes place. Policies in connection with real estate loans made by the Company shall not count, nor shall policies on the Branch Manager's own life, unless a full year's premium shall have been paid thereon. Credit for annuities shall be decided upon by the Company. Business written by sub-agents appointed by the Branch Manager, under the terms of this Agreement shall count in accordance with the above conditions. The above shall be subject to any modification caused by any other representative being entitled to any portion of the said credit.

GENERAL CONDITIONS REGARDING COMPENSATION.

I.—If, in any case, it should be deemed proper in consequence of alleged misrepresentations made or misunderstandings had, at the time of the issue of a policy, to return the premiums thereon and cancel it, the Branch Manager shall lose all right to commissions on premiums under said policy, and shall be bound to repay on demand the amount of commissions received on premiums so returned.

II.—All commissions on premiums on all classes of policies not named in this Agreement, or upon policies which have to be reinsured, shall be determined by the Company.

III.—The scale of first year commissions payable hereunder shall be subject to revision.

IV.—When a policy that has been issued and paid for is changed, it shall be determined by the Company whether any, and if so what, commission shall be payable to the Branch Manager.

V.—If the actual or rated up age of the assured is over that at entrance, the commission on the first year's premium and on renewal premiums shall be calculated only on the amount of the corresponding premium at age

VI.—Commissions mentioned herein do not apply to Group Insurance, Employers', Wholesale, or Association Insurance.

VII.—No commission shall be allowed on policies changed from Group Insurance plan mentioned in Section No. 6 to regular Life or Endowment plans.

VIII.—Where a policy is written for collateral in connection with a mortgage loan made by this Company, the commission shall be determined by the Company.

CONDITIONS OF CONTRACT.

Regulations. The Branch Manager subscribes to the following terms of his employment and agrees that a failure on his part to comply with these conditions shall, at the option of the Company, immediately terminate this agreement, but nothing herein shall be construed to affect any claims of the Company upon the Branch Manager.

Limitations. 1. The Branch Manager shall have no authority on behalf of the Company to incur any liability or debt against the Company, to accept risks of any kind, revive policies, grant permits, make, alter or discharge any contract or lease, to waive forfeitures, to extend the time of payment of any premium, or to waive payment in cash.

Service. 2. The Branch Manager shall *devote his entire time to the business of the Company* and in the conducting of the business of the Branch he shall be governed strictly by the rules and instructions which he may receive from time to time from the Company. It is further understood that during the continuance of this Agreement the Branch Manager may not become in any way connected with or secure business for any other insurance company, except in special cases where permission has been obtained from the Company. All applications and Medical Reports shall be delivered to the Company whether the same have been reported upon favourably or unfavourably by the medical examiner.

Indebtedness. 3. The Company may offset against any claim for compensation under this Agreement or any other Agreement between the Branch Manager and the Company, or any representative of the Company, any debt or debts due or to become due from the Branch Manager to the Company, whether arising hereunder or otherwise, which debt or debts shall be a first lien against such compensation, and the ledger account of the Company shall be competent and conclusive evidence of the state of the accounts between any of the parties referred to in this section.

Bond Licenses. 4. The said Branch Manager shall at once, and before transacting business for the Company, furnish a satisfactory bond (upon which he shall pay the premium) payable to the Company for the faithful performance of the terms and conditions of this Agreement and shall increase the same from time to time if required by the Company so to do. In the event of failure, for fifteen days, to comply with either of the above requirements, the Company shall at its option have the right to immediately terminate this Agreement. The Branch Manager shall also pay for such Agent's license as may be necessary.

Records. 5. The Branch Manager shall keep regular and accurate statements of all business transactions. Accounts are to be completed by the Branch Manager and returned to the Company with a full statement of all collections and monies received, as directed by the Company. All books of accounts, rate books, letters, documents, vouchers and other books and papers connected with the business of said Branch, are the property of the Company, whether paid for by the Company or not, and at any and all times shall be open to the Company or its representatives, for the purpose of examination, and shall be delivered to the Company or its representatives on demand, or on termination of this Agreement.

Circulars, Advertising. 6. No circular, advertisement or other matter shall be printed, published or used in any way by the Branch Manager unless the same shall first have been approved by the Company, nor shall any expenditure be made on behalf of the Company unless previously authorized by the Company.

Rebating. 7. The Branch Manager agrees not to pay or allow or offer to pay or allow any rebate of premium. Any violation of this condition shall render this Agreement liable to immediate termination, and all rights and claims which the Branch Manager might otherwise have hereunder shall thereupon be forfeited and shall cease.

Collections. 8. All money or securities received or collected by the Branch Manager for or on behalf of the Company, shall be securely held by him as a fiduciary trust and shall not be used by him for any purpose whatsoever, but shall be by him promptly paid or remitted to the Company, or deposited in an account in the name of

Service. 2. The Branch Manager shall *devote his entire time to the business of the Company* and in the conducting of the business of the Branch he shall be governed strictly by the rules and instructions which he may receive from time to time from the Company. It is further understood that during the continuance of this Agreement the Branch Manager may not become in any way connected with or secure business for any other insurance company, except in special cases where permission has been obtained from the Company. All applications and Medical Reports shall be delivered to the Company whether the same have been reported upon favourably or unfavourably by the medical examiner.

Indebtedness. 3. The Company may offset against any claim for compensation under this Agreement or any other Agreement between the Branch Manager and the Company, or any representative of the Company, any debt or debts due or to become due from the Branch Manager to the Company, whether arising hereunder or otherwise, which debt or debts shall be a first lien against such compensation, and the ledger account of the Company shall be competent and conclusive evidence of the state of the accounts between any of the parties referred to in this section.

Bond Licenses. 4. The said Branch Manager shall at once, and before transacting business for the Company, furnish a satisfactory bond (upon which he shall pay the premiums) payable to the Company for the faithful performance of the terms and conditions of this Agreement and shall increase the same from time to time if required by the Company so to do. In the event of failure, for fifteen days, to comply with either of the above requirements, the Company shall at its option have the right to immediately terminate this Agreement. The Branch Manager shall also pay for such Agent's license as may be necessary.

Records. 5. The Branch Manager shall keep regular and accurate statements of all business transactions. Accounts are to be completed by the Branch Manager and returned to the Company with a full statement of all collections and monies received, as directed by the Company. All books of accounts, rate books, letters, documents, vouchers and other books and papers connected with the business of said Branch, are the property of the Company, whether paid for by the Company or not, and at any and all times shall be open to the Company or its representatives, for the purpose of examination, and shall be delivered to the Company or its representatives on demand, or on termination of this Agreement.

Circulars, Advertising. 6. No circular, advertisement or other matter shall be printed, published or used in any way by the Branch Manager unless the same shall first have been approved by the Company, nor shall any expenditure be made on behalf of the Company unless previously authorized by the Company.

Rebating. 7. The Branch Manager agrees not to pay or allow or offer to pay or allow any rebate of premium. Any violation of this condition shall render this Agreement liable to immediate termination, and all rights and claims which the Branch Manager might otherwise have hereunder shall thereupon be forfeited and shall cease.

Collections. 8. All money or securities received or collected by the Branch Manager for or on behalf of the Company, shall be securely held by him as a fiduciary trust and shall not be used by him for any purpose whatsoever, but shall be by him immediately paid or remitted to the Company, or deposited in an account in the name of the Canada Life Assurance Company in such bank as it may designate; and it is expressly stipulated and agreed between the parties hereto, that in case the Branch Manager shall withhold any funds, policies or receipts belonging to the Company, after such funds, policies or receipts should in accordance with the Company's rules have been reported upon and transmitted to the Company, or if he shall withhold any funds, policies or receipts, after they have been demanded from him in writing, such dereliction shall work a forfeiture, unconditionally, of this Agreement and of all claims whatsoever accrued or to accrue under this Agreement to the Branch Manager, but nothing herein shall be construed to affect any claims of the Company upon the Branch Manager.

Territory. Subordinate Agents. 9. The territory in which the Branch Manager shall operate is ~~the State of Michigan, the Counties of Muskegon, Allegan, Kent, Kalamazoo, Barry, Ionia, Gratiot, Ottawa and Clinton, known as the Grand Rapids Branch, to remain as at present until it is specifically requested by the Branch Manager that they be placed under his jurisdiction.~~

but the Company shall have the right to send travelling or other Agents or officers into such territory to solicit and

effect insurance therein and to transact such other business as the interests of the Company may require. The Branch Manager shall cause the said territory to be thoroughly and ably canvassed, and to this end shall have the right within the said territory to appoint subordinate Agents within the terms of this Agreement, for whose fidelity and honesty he shall be responsible to the Company. A copy of every agreement made with such subordinate Agents shall be furnished to the Company at the time such agreements are entered into. Such appointment, however, shall be subject to the approval of the Company, and to such rules and instructions as may, from time to time, be established, and the Branch Manager shall be responsible to the Company for all monies collected by, or passing through the hands of such subordinate Agents, and the Branch Manager agrees to procure from every subordinate Agent, and deposit with the Company, a bond, satisfactory to the Company, for the due performance of his office, and a Government license. In case of the termination of this Agreement, or in case any subordinate Agents operating under the Branch Manager, leave the jurisdiction of the Branch Manager to become connected with the Company in another territory or in another capacity, the Company may, and is hereby empowered to, pay said subordinate Agents any commission or other compensation which the Branch Manager shall have agreed to pay to the said subordinate Agents, or any renewal commissions or compensation which would have been due the said subordinate Agents had they remained under the jurisdiction of the Branch Manager, and offset against all claims made under this Agreement such commission or compensation so paid, but nothing herein mentioned shall be held or interpreted as binding the Company to do so. And it is agreed that the liability entered into and assumed by the Branch Manager for and on behalf of subordinate Agents shall continue notwithstanding that the appointments of such subordinate Agents shall have been approved of by the Company, and the agreements and bonds above referred to shall have been entered into with the Company direct instead of with the Branch Manager, and that no act of the Company in its dealings with such subordinate Agents shall in any way release the said Branch Manager from his liability to the Company hereunder, and further that any subordinate Agent shall be the employee of the Branch Manager only, and shall under no circumstances have any claim whatsoever against the Company. Should such subordinate Agent become in any way indebted to the Company, the Branch Manager shall have no interest in either first year or renewal commissions on business secured by such subordinate Agent until such time as such indebtedness has been liquidated to the Company.

Previous Agreements. 10. In consideration of this Agreement, all existing agreements between the parties hereto, from the taking effect hereof, shall cease and terminate. Either party hereto may terminate this Agreement by giving to the other 60 days' notice in writing to that effect.

Confidential. 11. The Branch Manager agrees to consider the terms of this Agreement as strictly confidential, and agrees that he shall not mention nor exhibit the terms hereof to any person or persons under penalty of forfeiture of his rights hereunder.

Assignment. 12. Any rights of the Branch Manager under this Agreement shall not be sold or assigned by him without the consent of the Company in writing.

In Witness Whereof, *the parties hereto have set their hands this* 23rd

day of January 19 24

J. W. Taylor
Witness.

J. H. Abbass
Witness.

CANADA LIFE ASSURANCE COMPANY.

J. W. McCutcheon
General Superintendent

Branch Manager

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65 Attached to and forming part of the Contract between the Canada Life Assurance Company, and Gerald A. Eubank, of Detroit, Michigan, dated the 22nd day of January 1924.

13. It is further understood and agreed that during the continuance of this agreement only the Branch Manager will be allowed a collection charge of two percent (2%) on With Profit premiums and one percent (1%) on Without Profit premiums, after the nine-year period mentioned under Clause headed "Renewal Commissions" has expired.

14. Until further notice by the Company, the Branch Manager will be paid a salary in monthly instalments at the rate of $10,000 a year. The said salary is not in any event to extend beyond the continuance of this agreement.

15. It is hereby understood that in such cases in which the Company approves agreements and authorizes advances to subordinate agents appointed under the terms of this agreement and working in the Branch Manager's territory, one half the losses, if any, of such subordinate agent's advances are to be borne by the Company, the balance to be borne by the Branch Manager.

16. The Branch Manager shall be allowed his actual travelling expenses while away from Detroit, in the Branch Manager's territory on the Company's business.

17. Clauses Nos. 13 and 14 are to be considered as part of the "Compensation" under this agreement and shall be subject to the "General Conditions Regarding Compensation" and to "Conditions of Contracts" herein.

66 18. The Company agrees to furnish a suitable office and pay the necessary clerk hire, telephone, telegraph, and postage charges.

19. The Branch Manager shall be advanced the sum of $[illegible]083.33 per month until further notice. These advances are to be considered as a first lien and charge against all commissions, salary, or other compensation earned by the Branch Manager under the terms of this agreement, or any other agreements between the parties hereto. It is further agreed that these advances are not in any event to extend beyond the continuance of this agreement. It is further agreed and understood that any commissions, salary, or other compensations earned by the Branch Manager under this agreement or any other agreement between the parties hereto, over and above the advances paid him under this clause, shall be retained by the Company to liquidate any indebtedness on the part of the Branch Manager to the Company.

20. It is hereby agreed and understood between the parties hereto that the Company will undertake all responsibility in connection with the payment of the extra commission of five percent

(5%) on second year with profit premiums and one and one-half percent (1½%) on without profit premiums and any pension payable to an agent of the Company under the terms of any Whole Time agreement entered into by the Branch Manager and approved by the Company in writing.

21. It is further agreed and understood that in the event of the Company paying a pension to any agent so appointed by the Branch Manager all renewal commissions waived or relinquished by the Agent in accordance with the terms of the Pension Clause in his agreement with the Branch Manager shall be paid over to the Company and the Branch Manager shall have no right, title, or interest in the said commissions.

67 22. It is further agreed and understood, however, that this does not in any way affect the overriding commissions or any unearned commissions payable to the Branch Manager under the terms of his agreement with the Company on policies effected by or through the Agent. The terms "overriding Commissions" and "Unearned commissions" used in this clause are intended to refer to the difference between the commissions actually earned by the Agent and the commissions payable to the Branch Manager under his agreement with the Company on policies effected by or through the Agent.

Exhibit E

For a valuable consideration, the undersigned, Gerald A. Eubank hereby sells, assigns, and transfers to the Union Trust Company, of Detroit, Michigan, all his right, title, and interest in and to a certain agreement bearing date the 22nd day of January 1924, between Canada Life Assurance Company, of the first part, and said Gerald A. Eubank, party of the second part, made in connection with the employment by the said Assurance Company of the said Eubank as a branch manager for said Company, together with all moneys payable or to become payable to the said Eubank under and by virtue of the terms of the said contract.

In witness whereof, said Gerald A. Eubank has hereunto set his hand and seal this 24th day of November 1924.

Signed, sealed, and delivered in presence of:

(Signed) GERALD A. EUBANK. [L. S.]
(Signed) H. G. WOODRUFF.
(Signed) NED W. ANDRUS.

68 STATE OF MICHIGAN,
County of Wayne, ss:

On this 24th day of November 1924, before me, a notary public in and for said County, personally appeared Gerald A. Eubank,

to me known to be the person described in and who executed the foregoing instrument, and acknowledged that he executed the same as his free act and deed.

H. G. WOODRUFF,
Notary Public,
Wayne County, Michigan.

My Commission expires Jan. 20, 1928.

TORONTO, CANADA, *December 3, 1924.*

Receipt is hereby acknowledged of instrument of assignment dated November 24th, 1924, from Gerald A. Eubank to the Union Trust Company, of Detroit, Michigan, covering all his right, title, and interest in and to agreement of January 22nd, 1924, between the undersigned and said Gerald A. Eubank, a copy of which assignment is hereto attached.

CANADA LIFE INSURANCE COMPANY,
By H. G. WOODRUFF, *General Manager.*

69 In United States Circuit Court of Appeals for the Second Circuit

B. T. A. Docket No. 86200

Praecipe for transcript of record

Filed August 2, 1939

To the Clerk of the UNITED STATES BOARD OF TAX APPEALS:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Second Circuit copies duly certified as correct of the following documents in the above-entitled case:

1. The docket entries of proceedings before the Board;
2. Pleadings before the Board;
3. Findings of fact, opinion, and decision of the Board;
4. Petition for review, together with notice of filing and proof of service;
5. Agreement substituting stipulation of facts for statement of evidence;
6. Stipulation of facts; and
7. This praecipe.

(S) HARRY J. RUDICK,
(S) JOHN D. GARRISON,
Attorneys for Petitioner,
25 Broadway, New York, N. Y.

Service of a copy of the foregoing praecipe is acknowledged this 29th day of July 1939. No counterpraecipe will be filed.

J. P. WENCHEL,
Chief Counsel, Bureau of Internal Revenue,
Counsel for Respondent.

70 [Clerk's certificate to foregoing transcript omitted in printing.]

71 In United States Circuit Court of Appeals for the Second Circuit

No. 138—October Term, 1939

(Argued February 16, 1940—Decided March 25, 1940)

GERALD A. EUBANK, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Petition to review a decision of the United States Board of Tax Appeals

The taxpayer seeks reversal of the Board's redetermination of a deficiency in his income tax for the year 1933. Reversed.

For the opinion of the Board see 39 B. T. A. 583.

Before SWAN, AUGUSTUS N. HAND, and PATTERSON, Circuit Judges.

Harry J. Rudick, Attorney for petitioner; Lord, Day & Lord and John W. Drye, Jr., of Counsel. Samuel O. Clark, Jr., Assistant Attorney General; Sewall Key and Morton K. Rothschild, Special Assistants to the Attorney General, for respondent.

Opinion

72 SWAN, Circuit Judge:

The question presented is whether renewal commissions payable to a general agent of a life insurance company after the termination of his agency and by him assigned prior to the taxable year, must be included in his income despite the assignment.

During part of the year 1924 the petitioner was employed by The Canada Life Assurance Company as its branch manager for the state of Michigan. His compensation consisted of a salary plus certain commissions. His employment terminated on September 1, 1924. Under the terms of his contract he was entitled to renewal commissions on premiums thereafter collected by the

company on policies written prior to the termination of his agency, without the obligation to perform any further services. In November 1924 he assigned his right, title, and interest in the contract as well as the renewal commissions to a corporate trustee. From September 1, 1924 to June 30, 1927, the petitioner and another, constituting the firm of Hart & Eubank, were general agents in New York City for the Aetna Life Assurance Company, and from July 1, 1927 to August 31, 1927, the petitioner individually was general agent for said Aetna Company. The Aetna contracts likewise contained terms entitling the agent to commissions on renewal premiums paid after termination of the agency, without the performance of any further services. On March 28, 1928, the petitioner assigned to the corporate trustee all commissions to become due him under the Aetna contracts. During the year 1933 the trustee collected by virtue of the assignments renewal commissions payable under the three agency contracts above mentioned, amounting to some $15,600. These commissions were taxed to the petitioner by the commissioner and the Board has sustained the deficiency resulting therefrom.

It is the view of the Board that Congress intended to tax salaries and commissions to those who earn them regardless
73 of priar assignments. Lucas v. Earl, 281 U. S. 111, and Burnet v. Leininger, 285 U. S. 136, are strongly relied upon. But in those cases, as this court has frequently pointed out, the assignor remained in control of the income, since it was only through his continued efforts that it could be earned. See Commissioner v. Field, 42 F. (2d) 820, 822; Lowery v. Helvering, 70 F. (2d) 713, 714; Rossmore v. Commissioner, 76 F. (2d) 520, 521; Shanley v. Bowers, 81 F. (2d) 13, 15; Machette v. Helvering, 81 F. (2d) 73, 74, cert. denied, 298 U. S. 677. In the case at bar the petitioner owned a right to receive money for past services; no further services were required. Such a right is assignable. At the time of assignment there was nothing contingent in the petitioner's right, although the amount collectible in future years was still uncertain and contingent. But this may be equally true where the assignment transfers a right to income from investments, as in Blair v. Commissioner, 300 U. S. 5, and Horst v. Commissioner, 107 F. (2d) 906 (C. C. A. 2), or a right to patent royalties, as in Nelson v. Ferguson, 56 F. (2d) 121 (C. C. A. 3). cert. denied, 286 U. S. 565. By an assignment of future earnings a taxpayer may not escape taxation upon his compensation in the year when he earns it. But when a taxpayer who makes his income tax return on a cash basis assigns a right to money payable in the future for work already performed, we believe that he transfers a property right, and the money, when received by the

assignee, is not income taxable to the assignor. The authorities are divergent. Hall v. Burnet, 54 F. (2d) 443 (C. A. D. C.), cert. denied, 285 U. S. 552, accords with our decision in the present case. Bishop v. Commissioner, 54 F. (2d) 298 (C. C. A. 7); Parker v. Routzahn, 56 F. (2d) 730 (C. C. A. 6), cert. denied, 287 U. S. 606; and Van Meter v. Commissioner, 61 F. (2d) 817 (C. C. A. 8) appear to be opposed to it. We believe that the limitation which this court set upon the doctrine of Lucas v. Earl is reasonable and should be followed by us unless higher authority determines it to be wrong.

Order reversed.

Dissenting opinion

74 PATTERSON, Circuit Judge, dissenting.

The renewal commissions were compensation for personal services rendered by the petitioner. In Lucas v. Earl, 281 U. S. 111, it was held that the Revenue Act of 1918, in providing for tax on "income derived from salaries, wages, or compensation for personal services," imposed the tax on him who earned the compensation, regardless of an assignment in favor of another. There the assignment was made in advance of earning the compensation, but the court put no stress on that feature. It was laid down broadly that the person taxed on account of personal compensation was the earner, and that the tax could not be deflected from him to another by means of an assignment. That this is the effect of the Earl case is indicated not only from the opinion in that case, but also from the later discussion of the case in Burnet v. Leininger, 285 U. S. 136, 141–142, and in Blair v. Commissioner, 300 U. S. 5, 11. I do not find any reason to confine the rule to instances where earnings have been assigned prior to the time when they were earned. On the contrary, I am of opinion that Lucas v. Earl governs a case like the present one, an assignment made after earning compensation. The 1932 Act is the same as the 1918 Act as to income from wages, salary, and compensation. I agree with the Board's decision and vote to affirm it.

75 In United States Circuit Court of Appeals, Second Circuit

GERALD A. EUBANK, PETITIONER
v.
COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Judgment

Filed April 12, 1940

Appeal From the United States Board of Tax Appeals

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said United States Board of Tax Appeals be, and it hereby is, reversed.

It is further ordered that a Mandate issue to the said Board in accordance with this decree.

D. E. ROBERTS, *Clerk.*

76 [File endorsement omitted.]

77 [Clerk's certificate to foregoing transcript omitted in printing.]

78 Supreme Court of the United States

Order allowing certiorari

Filed October 14, 1940

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted, and the case is assigned for argument immediately following No. 27.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Endorsement on cover:] File No. 44554. U. S. Circuit Court of Appeals, Second Circuit. Term No. 205. Guy T. Helvering, Commissioner of Internal Revenue, Petitioner, vs. Gerald A. Eubank. Petition for a writ of certiorari and exhibit thereto. Filed July 5, 1940. Term No. 205, O. T. 1940.

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. ——

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

GERALD A. EUBANK

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of Guy T. Helvering, Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Second Circuit entered in the above-entitled cause on April 12, 1940, reversing the decision of the Board of Tax Appeals.

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 14) is reported in 39 B. T. A. 583. The opinion of the Circuit Court of Appeals (R. 71) is reported in 110 F. (2d) 737.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on April 12, 1940. (R. 73.) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The ~~petitioner~~ respondent, a life insurance agent, became entitled to renewal commissions on policies sold by him. The question presented is whether his assignment of such income to another relieves him of tax thereon.

STATUTE INVOLVED

Revenue Act of 1932, c. 209, 47 Stat. 169:

> SEC. 22. GROSS INCOME.
>
> (a) *General definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *
>
> * * * * *

STATEMENT

The facts, as stipulated (R. 40–68), and as found by the Board of Tax Appeals (R. 14–20), may be summarized as follows:

From January 1 to September 1, 1924, the taxpayer was employed by the Canada Life Assurance Company as its branch manager for the State of Michigan. Under the contract of employment he was entitled to renewal commissions on premiums thereafter collected with respect to life insurance policies sold prior to the termination of the contract. (R. 14–15.)

In November, 1924, he assigned his interest in these renewal commissions to the Union Trust Co., Detroit, Michigan (subsequently the Union Guardian Trust Co.). (R. 15.)

From September 1, 1924, to June 30, 1927, the taxpayer and one Hart, a partner, were general agents in New York for the Aetna Life Insurance Co., and from July 1, 1927, to August 31, 1927, the taxpayer individually was a general agent for said Aetna Company. (R. 15–16.) Under contracts with the Aetna he was likewise entitled to renewal commissions after the termination of his agency, without the performance of any further services. (R. 16.) In March, 1928, he assigned the commissions to become due him under the Aetna contracts. (R. 16–19.)

During the year 1933 the assignee received renewal commissions in the aggregate amount of

$15,612.79 payable under the above mentioned contracts. (R. 19–20.) The Commissioner of Internal Revenue ruled that those commissions should be included in the taxpayer's gross income. The Board of Tax Appeals approved that determination, but the Circuit Court of Appeals reversed.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the renewal commissions which the taxpayer assigned to another should not be included in his gross income under Section 22 (a) of the Revenue Act of 1932.

2. In failing to hold that the renewal commissions which he assigned to another should be included in his gross income under Section 22 (a) of the Revenue Act of 1932.

3. In construing Section 22 (a) of the Revenue Act of 1932 so that it would apply only to an assignment of future earnings and not to one of past earnings.

4. In reversing the decision of the Board of Tax Appeals.

REASONS FOR GRANTING THE WRIT

1. There is a direct conflict, as the court below expressly recognized (R. 72), between the decision in the instant case and *Bishop* v. *Commissioner*, 54 F. (2d) 298 (C. C. A. 7th), *Parker* v. *Routzahn*, 56 F. (2d) 730 (C. C. A. 6th), certiorari denied,

287 U. S. 606, and *Van Meter* v. *Commissioner*, 61 F. (2d) 817 (C. C. A. 8th).

2. The decision below is in conflict with *Lucas* v. *Earl*, 281 U. S. 111, where this Court held that the tax upon earnings could not be deflected by assignments or other anticipatory arrangements. The court below distinguished *Lucas* v. *Earl* on the ground that there the assignment related to earnings from future services whereas the assignments here were of earnings with respect to past services. However, as pointed out in Judge Patterson's dissenting opinion (R. 72–73), there is nothing in the opinion in *Lucas* v. *Earl* or in later decisions of this Court which so limits the holding in *Lucas* v. *Earl*. The majority of the court below must have recognized doubt as to its understanding of *Lucas* v. *Earl*, for it stated that the limitation which it read into that decision should be followed "unless higher authority determines it to be wrong." (R. 72.)

3. This case raises a question which is cognate to that presented in *Helvering* v. *Horst*, certiorari granted April 8, 1940, No. 27, 1940 Term, and it would be desirable to have both cases presented to the Court at the same time.

CONCLUSION

It is therefore respectfully submitted that this petition for a writ of certiorari should be granted.

FRANCIS BIDDLE,
Solicitor General.

JULY 1940.

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PETITIONER'S BRIEF

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 205

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

GERALD A. EUBANK

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 8) is reported in 39 B. T. A. 583. The opinion of the Circuit Court of Appeals (R. 38) is reported in 110 F. (2d) 737.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on April 12, 1940 (R. 41). The petition for a writ of certiorari was filed July 5, 1940, and granted October 14, 1940 (R. 41). The

jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The respondent, a life insurance agent, became entitled to renewal commissions on policies sold by him. The question presented is whether his assignment of such income to another relieves him of tax thereon.

STATUTE INVOLVED

Revenue Act of 1932, c. 209, 47 Stat. 169:

> SEC. 22. GROSS INCOME.
>
> (*a*) *General definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *
>
> * * * * * *

STATEMENT

The facts, as stipulated (R. 24–37), and as found by the Board of Tax Appeals (R. 9–12), may be summarized as follows:

From January 1 to September 1, 1924, the taxpayer was employed by the Canada Life Assurance Company as its branch manager for the State of Michigan. Under the contract of employment he was entitled to renewal commissions on premiums thereafter collected with respect to life insurance policies sold prior to the termination of the contract (R. 8–9).

In November 1924 he assigned his interest in these renewal commissions to the Union Trust Company, Detroit, Michigan (subsequently the Union Guardian Trust Company) (R. 9).

From September 1, 1924, to June 30, 1927, the taxpayer and one Hart, a partner, were general agents in New York for the Aetna Life Insurance Company, and from July 1, 1927, to August 31, 1927, the taxpayer individually was a general agent for said Aetna Company (R. 9). Under contracts with Aetna he was likewise entitled to renewal commissions after the termination of his agency, without the performance of any further services (R. 9). In March 1928 he assigned the commissions to become due him under the Aetna contracts (R. 10–11).

During the year 1933 the assignee received renewal commissions in the aggregate amount of $15,612.79 payable under the above-mentioned contracts (R. 11–12). The Commissioner of Internal Revenue ruled that those commissions should be included in the taxpayer's gross income. The

Board of Tax Appeals approved that determina tion, but the Circuit Court of Appeals reversed one judge dissenting.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the renewal commissions whic the taxpayer assigned to another should not be in cluded in his gross income under Section 22 (a) o the Revenue Act of 1932.

2. In failing to hold that the renewal commis sions which he assigned to another should be in cluded in his gross income under Section 22 (a) of the Revenue Act of 1932.

3. In construing Section 22 (a) of the Revenu Act of 1932 so that it would apply only to an assign ment of future earnings and not to one of past earn ings.

4. In reversing the decision of the Board of Ta Appeals.

SUMMARY OF ARGUMENT

The income in question consists of renewal com missions on policies of life insurance to which th taxpayer was entitled by reason of prior sales o policies. It is income attributable to his persona services and is taxable to him notwithstanding hi attempt to deflect the income from himself by as signment.

The general principles discussed in our brief i *Helvering* v. *Horst,* No. 27, require that the as signor remain liable in such circumstances.

But, in any event, the income here is taxable to respondent under *Lucas* v. *Earl,* 281 U. S. 111, since it represents income from personal services. The decision in the *Earl* case makes it clear that the statute taxes earned income to the one who earns it, and that liability cannot be avoided by assigning the income to another. There is nothing in the language of the opinion in *Lucas* v. *Earl* which limits the decision to assignments of "future earnings." Indeed, the opinion makes it plain that taxability does not depend upon future performance of services by the assignor. The decision was rested upon the broad ground that, under the statute, earned income is taxable to the earner.

ARGUMENT

THIS CASE IS CONTROLLED BY *LUCAS* v. *EARL*, WHICH CONSTRUES THE STATUTE AS TAXING COMPENSATION TO THE ONE WHO EARNS IT, REGARDLESS OF ASSIGNMENTS

1. In our brief in *Helvering* v. *Horst,* No. 27, we contend that an assignment of income from property for the benefit of a member of the assignor's family cannot relieve the assignor of tax liability with respect to such income. We believe that the principles there discussed likewise require the assignor to remain liable here.[1] But even if

[1] The record herein shows that the renewal commissions were assigned to a trustee, the Union Trust Company of Detroit, Michigan, without disclosing the identity of the beneficiaries. However, if the Court, in considering here that portion of the *Horst* brief dealing with *Helvering* v. *Clifford,* 309 U. S. 331, believes that it is important to ascertain

we should be wrong on our second contention in the *Horst* case that the assignor's liability is not limited to assignments of *earned* income (as contrasted with income from property), then the assignor here is nevertheless taxable, since the assignments in this case were of earnings.[2]

2. Under Section 22 (a) of the Revenue Act of 1932 the taxpayer's gross income is defined to include income "derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid". And it was established at an early date that renewal commissions, such as are involved here, constitute income derived from "personal services" within the meaning of the revenue acts. *Edwards* v. *Keith*, 231 Fed. 110 (C. C. A. 2d). This Court denied certiorari (243 U. S. 638), and the result there

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the beneficiaries of the trust and remands the case for that purpose, the Government is prepared to show that the trustee was directed to pay premiums on fire insurance policies on real estate conveyed to the trust by the taxpayer and his wife, to pay all taxes assessed against such real estate, to pay interest and principal on mortgages upon such real estate, to pay premiums on policies of insurance on the taxpayer's life, to pay interest and principal on debts of the taxpayer or his wife to the trustee, and to pay any remaining income to the taxpayer's wife. And the Government is prepared to show further that upon his wife's death the corpus was to be delivered to him; or, should he predecease her, the trust was to continue for her life, at the end of which the corpus was to be distributed among their children per stripes.

[2] It may be noted that Judge Patterson, who wrote the opinion of the court in the *Horst* case against the Government, dissented here on that very ground.

reached does not seem to have been seriously challenged since that time. See *Woods* v. *Lewellyn*, 252 Fed. 106 (C. C. A. 3d).

The respondent herein seeks escape from tax solely upon the ground that he had assigned his renewal commissions and that they were paid by the insurance companies to the assignee rather than to himself. It is our position that such escape is blocked by *Lucas* v. *Earl*, 281 U. S. 111.

In *Lucas* v. *Earl*, the taxpayer made an assignment of one-half his future earnings to his wife by written contract executed in 1901, and the question was whether the contract relieved him of tax liability in 1920 and 1921 on one-half his earnings which, according to the contract, belonged to his wife. There was no dispute that the taxpayer's wife was legally entitled to one-half his earnings, and this Court in its opinion expressly assumed the validity of the contract between the spouses. Nevertheless the Court held that the husband's entire salary was taxable to him. In construing the applicable provisions of the Revenue Acts of 1918 and 1921, which are identical with the corresponding provisions in Section 22 (a) of the Revenue Act of 1932 here involved, Mr. Justice Holmes said (pp. 114–115):

> There is no doubt that the statute could tax salaries to those who earned them and provide that the tax could not be escaped by anticipatory arrangements and contracts however skilfully devised to prevent the salary when paid from vesting even for

> a second in the man who earned it. That seems to us the import of the statute before us * * *.

The holding in *Lucas* v. *Earl* that earnings are taxable to the earner regardless of any contractual arrangement whereby they may be diverted to another, has been repeatedly recognized and approved by this Court. In *Poe* v. *Seaborn*, 282 U. S. 101, the Court, although ruling that income of the spouses in a community property state was to be divided equally between them for income-tax purposes, nevertheless carefully pointed out the scope of its holding in *Lucas* v. *Earl*, p. 117):

> We held that, assuming the validity of the contract under local law, it still remained true that the husband's professional fees, earned in years subsequent to the date of the contract, were his individual income, "derived from salaries, wages, or compensation for personal services" under §§210, 211, 212 (a) and 213 of the Revenue Act of 1918. The very assignment in that case was bottomed on the fact that the earnings would be the husband's property, else there would have been nothing on which it could operate. That case presents quite a different question from this, because here, by law, the earnings are never the property of the husband, but that of the community.[3]

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[3] The result in *Poe* v. *Seaborn* itself seems to be founded on a distinction which we believe to be very tenuous. It appears to proceed on the legal fiction that obtains in the com-

In *Burnet* v. *Leininger,* 285 U. S. 136, this Court held that an agreement by a member of a partnership that his wife should be an equal partner with him in his interest in the company and should share equally with him the profits and losses did not relieve the husband from income tax on his full distributive share from the partnership. In the course of its opinion, this Court referred to its decision in *Lucas* v. *Earl* as follows (pp. 141–142):

> The case of *Lucas* v. *Earl,* 281 U. S. 111, is analogous. There the husband made a contract with his wife by which his salary and fees were to be "received, held, taken and owned" by them as joint tenants. The Court recognized that a forcible argument was presented "to the effect that the statute seeks to tax only income beneficially received, and that taking the question more technically the salary and fees became the joint property of Earl and his wife on the very first instant in which they were received." But the case was deemed to turn on the import and reasonable construction of the taxing act. "There is no doubt" said

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munity property states to the effect that income received by either spouse is really the product of the joint efforts of both and that therefore the earnings belong to the "community" rather than to the individual spouse. By resorting to that fiction the Court was able to hold in *Poe* v. *Seaborn* that a husband's income in a community property state could be divided equally between the spouses for tax purposes because the earnings were that of the community. Without that fiction, the result there reached would seem to be inconsistent with *Lucas* v. *Earl.*

> the Court, "that the statute could tax salaries to those who earned them and provide that the tax could not be escaped by anticipatory arrangements and contracts however skilfully devised to prevent the salary when paid from vesting even for a second in the man who earned it. That seems to us the import of the statute before us and we think that no distinction can be taken according to the motives leading to the arrangement by which the fruits are attributed to a different tree from that on which they grew." *Id.*, pp. 114, 115. This ruling was not disturbed by *Poe* v. *Seaborn*, 282 U. S. 101, which pointed out the distinction. *Id.*, p. 117.

See also *Balkwill* v. *Commissioner*, 77 F. (2d) 569 (C. C. A. 6th), certiorari denied, 296 U. S. 609; *Kasch* v. *Commissioner*, 63 F. (2d) 466 (C. C. A. 5th); *Rossmoore* v. *Commissioner*, 76 F. (2d) 520 (C. C. A. 2d).

Again, in *Blair* v. *Commissioner*, 300 U. S. 5, an assignor of a beneficial interest in a trust was held not taxable upon income from that portion of the trust, but the Court was careful to distinguish *Lucas* v. *Earl*, saying (p. 11):

> In the *Lucas* case the question was whether an attorney was taxable for the whole of his salary and fees earned by him in the tax years or only upon one-half by reason of an agreement with his wife by which his earn-

> ings were to be received and owned by them jointly. We were of the opinion that the case turned upon the construction of the taxing act. We said that "the statute could tax salaries to those who earned them and provide that the tax could not be escaped by anticipatory arrangements and contracts however skilfully devised to prevent the same when paid from vesting even for a second in the man who earned it." That was deemed to be the meaning of the statute as to compensation for personal service, and the one who earned the income was held to be subject to the tax. * * *

See also *Griffiths* v. *Commissioner,* 308 U. S. 355, 358.

Moreover, the principles established in *Lucas* v. *Earl* have been applied in a wide variety of cases in the lower courts. E. g., *Daugherty* v. *Commissioner,* 63 F. (2d) 77 (C. C. A. 9th); *Jones* v. *Page,* 102 F. (2d) 144 (C. C. A. 5th), certiorari denied, 308 U. S. 562; *Saenger* v. *Commissioner,* 69 F. (2d) 631 (C. C. A. 5th); *Emery* v. *Commissioner,* 78 F. (2d) 437 (C. C. A. 1st); *Luce* v. *Burnet,* 55 F. (2d) 751 (App. D. C.); *Comer* v. *Davis,* 107 F. (2d) 355 (C. C. A. 5th); *Turbeville* v. *Commissioner,* 84 F. (2d) 307 (C. C. A. 5th); *Blumenthal* v. *Commissioner,* 60 F. (2d) 715 (C. C. A. 2d); *Helvering* v. *Gordon,* 87 F. (2d) 663, 666 (C. C. A. 8th); *Rossmoore* v. *Anderson,* 67 F. (2d) 1009 (C. C. A. 2d), affirming 1 F. Supp. 35 (S. D. N. Y.); *Groves* v.

Commissioner, 99 F. (2d) 179 (C. C. A. 4th).[4] And the doctrine of *Lucas* v. *Earl* has been applied to assignments of renewal commissions such as are involved in the case at bar. *Van Meter* v. *Commissioner,* 61 F. (2d) 817 (C. C. A. 8th); *Bishop* v. *Commissioner,* 54 F. (2d) 298 (C. C. A. 7th); *Parker* v. *Routzahn,* 56 F. (2d) 730 (C. C. A. 6th), certiorari denied, 287 U. S. 606. *Contra: Hall* v. *Burnet,* 54 F. (2d) 443 (App. D. C.), certiorari denied, 285 U. S. 552.

The court below undertook to distinguish *Lucas* v. *Earl* on the ground that the taxpayer here had already completed his services when he made the assignments in question, whereas the taxpayer in the *Earl* case had not yet performed the services at the time of assignment. But, as Judge Patterson pointed out in his dissenting opinion, there is nothing in the opinion in *Lucas* v. *Earl* that so confines its holding (R. ~~72–73~~):

> There the assignment was made in advance of earning the compensation, but the court put no stress on that feature. It was laid down broadly that the person taxed on ac-

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[4] However, the decisions in the lower courts have not been entirely uniform. See *Nelson* v. *Ferguson,* 56 F. (2d) 121 (C. C. A. 3d) (assignment of patent rights); *Helvering* v. *Seatree,* 72 F. (2d) 67 (App. D. C.) (assignment of payments for good-will). (The Circuit Court of Appeals for the Second Circuit has itself recognized confusion among the decisions. See *Rossmoore* v. *Commissioner,* 76 F. (2d) 520, 521–522 (C. C. A. 2d).

> count of personal compensation was the earner, and that the tax could not be deflected from him to another by means of an assignment. * * *

Indeed, a careful reading of the opinion in *Lucas* v. *Earl* will disclose that the Court deliberately rested the result upon the broad ground that income from services is taxed to the one who earned it. The taxpayer had argued that the disputed salary and fees became the property of his wife "on the very first instant on which they were received" (281 U. S., at 114). The Court expressed doubt as to the soundness of that contention, saying: "We might well hesitate upon the latter proposition, because however the matter might stand between husband and wife he was the only party to the contracts by which the salary and fees were earned, and it is somewhat hard to say that the last step in the performance of those contracts could be taken by anyone but himself alone." Thus, the Court indicated that it might have decided the case on the narrow ground that the taxpayer's continued efforts were necessary to produce the income in question. But the Court proceeded to disclaim any intention of deciding the case upon such narrow ground. Immediately following the language just quoted, the Court stated (281 U. S., at 114):

> But this case is not to be decided by attenuated subtleties. It turns on the import and reasonable construction of the taxing act.

The Court then went on to hold broadly that the statute taxed salaries to those who earned them. Thus, it is apparent from the opinion itself in *Lucas* v. *Earl* that there is no warrant for the limitation which the court below engrafted upon that decision.

The Government's position is in accord with a Treasury ruling which squarely covers the situation presented in the instant case. G. C. M. 19213, 1937–2 Cum. Bull. 220. Although it is true that this ruling was not embodied in a formal "Treasury Decision" and therefore does not have the same dignity as a regulation, it is nevertheless a correct construction of the statute and should be followed.

If the "past services" formula of the court below is correct, the opportunity for tax avoidance would be alarming. Thus, a lawyer at the end of each year might assign to his wife his fees for services already performed, and claim tax immunity on such fees as are paid to his wife. It seems impossible to believe that *Lucas* v. *Earl* ever intended to sanction the efficacy of such a device. Indeed, any fair reading of the opinion brings one irresistibly to the conclusion that the assignor would remain liable.

CONCLUSION

The judgment of the court below should be reversed and that of the Board of Tax Appeals affirmed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

DOCKET No. 205

GUY T. HELVERING, Commissioner of Internal Revenue,

Petitioner,

v.

GERALD A. EUBANK

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Opinions Below.

The opinion of the Board of Tax Appeals is reported at 39 B. T. A. 583. The opinion of the Circuit Court of Appeals is reported at 110 F. (2d) 737.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on April 12, 1940. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

Argument.

The respondent submits that the petition for a writ of certiorari should be denied for the reasons that: (1) this

Court has already on two occasions denied certiorari in cases involving the same legal issue; and (2) there is no conflict of decisions. These points will be discussed in the order named.

1. This Court has already denied certiorari in two cases dealing with the legal issue here involved.

This Court has already denied certiorari in *Hall* v. *Burnet,* 54 F. (2d) 443 (App. D. C., 1931), cert. den. 285 U. S. 552. There, as here, the property right to receive future renewal commissions on insurance policies was assigned and the assignor was held by the Court of Appeals, reversing the Board of Tax Appeals, *not* taxable on the commissions paid to the assignee. A writ was denied despite the fact that the Government in its petition for certiorari alleged conflict with the decision of the Circuit Court of Appeals for the Seventh Circuit in *Bishop* v. *Commissioner,* 54 F. (2d) 298 (C. C. A. 7th, 1931), which decision arrived at a different result on a different factual situation. This Court again denied a writ in *Parker* v. *Routzahn,* 56 F. (2d) 730 (C. C. A. 6th, 1932), cert. den. 287 U. S. 606, which held similar renewal commissions taxable to the husband as assignor, but in which the facts were also distinguished from those in *Hall* v. *Burnet.*

The *Hall* and *Parker* cases both involved the taxability of assigned renewal commissions, as does the present case. The *Parker* case distinguished *Hall* v. *Burnet* on the ground that in the *Hall* case no continued labors by the assignor after the date of the assignment were essential to the flow of income, and this Court refused to grant a review. The denial of certiorari in both the *Parker* and *Hall* cases compels the conclusion that this Court regards the present question as depending upon the factual existence of the assignor's control over the flow of the assigned income after

the assignment has been made. This was the test which the Court below applied. There is no novel element in the present case which requires a review of a situation which this Court has already on two separate occasions declined to pass upon. The fact that this Court on April 8, 1940 granted certiorari in *Helvering* v. *Horst*, No. 27, 1940 Term, involving the assignment of unmatured bond coupons (see Petitioner's Brief, p. 5), is not an adequate ground for the granting of a writ in the present case.

2. The decision of the Court below is not in conflict either with Lucas v. Earl, 281 U. S. 111, or with applicable decisions of other Circuit Courts of Appeals.

The decisions of the courts are in full agreement in holding that the assignee, rather than the assignor, is the taxable person where the property right to renewal commissions is assigned and the commissions are in no way dependent upon the continued services of the assignor. Certain of the holdings in which language is used indicating a conflict are perfectly reconcilable upon an examination of the facts involved. In not one of the cases decided in favor of the Government did it appear that the assignor had no further obligation to render services in order to insure the receipt of the commissions by the assignee.

The three cases referred to by the petitioner (pp. 4-5) fail, upon analysis, to support the petitioner's allegation of a conflict. In *Bishop* v. *Commissioner*, 54 F. (2d) 298 (C. C. A. 7th, 1931), the assignment (of the husband's right, title and interest in one-third of certain renewal commissions) was expressly made subject to the terms of a *continuing* contract with the insurance company, so that the assignor, by acts subsequent to the assignment, such as breach of the contract, could have defeated or at least diminished the assignee's right to receive commissions.

The assignor, therefore, retained a measure of control over the assigned income. The Court held the assignor taxable on the assigned commissions, but instead of indicating that its decision conflicted with *Hall* v. *Burnet,* the Court expressly cited and approved that decision. The distinction was made that in the *Hall* case, which involved a terminated contract*—as does the instant case—there was an assignment of a property right, *in praesenti,* which carried with it the income, whereas in the *Bishop* case, which involved a continuing contract, there was an assignment of the income *per se* rather than of the property right which produced the income. However, this is only another way of pointing out that an assignment of future earnings which is dependent upon the rendition of future services by the assignor cannot possibly convey a property right *in praesenti* for the reason that no one can assign the will to work, and consequently a right to receive income dependent upon the efforts of the assignor can never constitute an indefeasible right: the assignor necessarily retains control over the future income.

In *Parker* v. *Routzahn* an insurance agent had assigned to his wife all "renewal commissions hereafter accruing to me * * *." The Circuit Court of Appeals for the Sixth Circuit, in taxing the assignor upon the commissions paid over to the wife, stressed that by the facts of the situation, the assignment became effective only after the income had already been realized by the assignor. This was true because the assignor remained in the service of the company after the assignment and because, unlike the present situation, the income was dependent upon services performed subsequent to the assignment.

*See 17 B. T. A. 752. The contract in the *Hall* case was dated September 23, 1905, and ran for fifteen years; the assignment was made on January 2, 1921.

Hall v. *Burnet* was approved (p. 733) but was distinguished on this ground: "Such cases (including *Hall* v. *Burnet*), however, are substantially different, in their facts, from the present case, which involves an attempted assignment only of compensation for personal services of the assignor accruing subsequent to the time of such assignment."* In opposing certiorari in the *Parker* case, the Government itself pointed out the distinction between that case and the *Hall* case so succinctly that we take the liberty of adopting the following language from the Government's brief (p. 10):

> "The court (the Court of Appeals of the District of Columbia) pointed out that when the assignment was made (in 1921), the taxpayer's right to the commissions had become fixed independent of any future services to be rendered by him, and it construed the assignment as a present transfer of the property from which the income was derived and not merely an assignment of future earnings or income. Upon that ground the court held *Lucas* v. *Earl, supra,* inapplicable. Upon the same ground the *Hall* case was distinguished by the court below and by the Circuit Court of Appeals for the Seventh Circuit in *Bishop* v. *Commissioner, supra.*"

Since the instant case is substantially on all fours with the *Hall* case, the distinction drawn above between that

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*See also the following statement of the Court at page 731:

> "The funds and commissions mentioned in this instrument consisted of certain bonuses and commissions thereafter becoming payable by the insurance company to the plaintiff under the terms of his employment by it, *the amount of which compensation was dependent on the length of his service and the amount of premiums to be received by the company under its insurance policies sold by plaintiff in previous and in future years.*" (Italics ours.)

case and the *Parker* and *Bishop* cases also seems to distinguish the latter two cases from the instant case.

The facts in *Van Meter* v. *Commissioner,* 61 F. (2d) 817 (C. C. A. 8th, 1932), the final case which the petitioner asserts to be in conflict with the decision in the present case, also plainly disclosed that the assignments were made prior to the termination of the agency contracts and at a time when the assignor was still under obligation to the insurance company. In fact, one of the assignments was made prior to the date on which the contract with the insurance company was signed (see Board's statement of the facts, 22 B. T. A. 1204-5). Furthermore, the assignor, the Van Meter Company, actually continued to exercise control over the flow of the commissions, since it made various successive assignments during the term of the contract with the insurance company reapportioning the interests of the assignees in the commissions (22 B. T. A. 1206). Therefore, as in *Bishop* v. *Commissioner* and *Parker* v. *Routzahn,* the assignor, subsequent to the date of the assignment, had the power to defeat the interest of the assignees in the commissions. Clearly these factors demanded tax against the assignor regardless of the Eighth Circuit's superfluous expression of disagreement with the views expressed in *Hall* v. *Burnet.* On its facts the *Van Meter* case may plainly be distinguished from the present situation, in which the contracts at the time of the assignment were completely terminated and the petitioner was under no further obligation with respect to them.

The further statement in petitioner's brief (p. 5) that the decision below conflicts with the decision of this Court in *Lucas* v. *Earl,** 281 U. S. 111, fails to observe the dis-

* The Government made the same assertion of conflict in its petition for certiorari in the *Hall* case which was denied by this Court.

tinction which the lower court itself points out between the two situations. In that case, Earl and his wife agreed that any property thereafter acquired by either of them, whether by earnings or otherwise, "shall be treated and considered and hereby is declared to be received, held, taken and owned by us as joint tenants and not otherwise, with the right of survivorship." It is true that *Lucas* v. *Earl* appears to state broadly that a tax upon salary must be paid by the man who earns it. However, the respondent is erroneous in stating that nothing in the decisions of this Court limits the apparently broad holding of *Lucas* v. *Earl.* The respondent does not, for example, refer to the community property decisions of this Court, in which the Court held that income may be taxable to someone other than the earner if the person who performs the services has been completely divested of the right to the compensation before it accrues. See *Poe* v. *Seaborn,* 282 U. S. 101. Thus, Earl himself, if he is still alive and earning salaries and fees, is no longer taxable upon all of his compensation for personal services. California, in which he resided, is now a community property state, and as a consequence Earl would now be taxable only on one-half of such compensation. *U. S.* v. *Malcolm,* 282 U. S. 792.

In *Poe* v. *Seaborn,* the Court's opinion (282 U. S. 101, at p. 117) pointed out that in *Lucas* v. *Earl* the salaries were earned in years subsequent to the date of the contract. This is an all-important distinction since, so far as future earnings were concerned, Earl could render the future services or not, as he chose, and accordingly controlled the flow of income. There was, therefore, no property *res* which the taxpayer irrevocably transferred on the execution of the contract. In fact, the earnings in question in *Lucas* v. *Earl* did not arise from any contract of employment yet in existence at the time the contract be-

tween the husband and wife was executed. Here, on th other hand, an irrevocable assignment was made of th property right to receive commissions which were payabl because of past services and where the husband's contro over the situation and his entire employment with the in surance company had altogether ceased. Therefore, in stead of conflicting with *Lucas* v. *Earl,* the decision of th lower court is a necessary logical corollary of that decision The majority of the court below did not, as respondent implies, concede that its conclusion was in any way at vari ance with *Lucas* v. *Earl.* The court below was, it is true consciously distinguishing *Lucas* v. *Earl,* but the distinc tion was one which this Court has already recognized b its decision in *Poe* v. *Seaborn* and by its denial of certio rari in two cases (*Hall* v. *Burnet* and *Parker* v. *Routzahn*) which expressly interpreted the doctrine of the *Earl* case as applying only to future and not to past earnings.*

It is clear that an assignment of trust income operates to shift the tax from the assignor to the assignee. (*Blai*

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* In *Hall* v. *Burnet* the Court of Appeals of the District of Columbia distinguished that case from *Lucas* v. *Earl* a follows (54 F. (2d) 443 at 444):

> "Nor do we agree with the suggestion in the appel lee's brief that Lucas *v.* Earl, 281 U. S. 111, is control ling here.
>
> "* * * in the view we take of this case, wha was assigned was neither income nor earnings, bu property. *It was not an assignment of future earn ings* but the transfer of a property right, and thoug this property right gave rise to future income, uncer tain and contingent though it might be as to amount that fact does not destroy the distinction * * the right was fixed and certain, and *was independen of any future service to be rendered by him.* Any un certainty in the situation concerned only the amount but the agent's rights as against the insurance com pany were established." (Italics ours.)

v. *Commissioner,* 300 U. S. 5.) The same rule applies to an assignment of patent royalties (*Nelson* v. *Ferguson,* 56 F. (2d) 121, C. C. A. 3d, 1932, cert. den. 286 U. S. 565); an assignment of payments in the nature of an annuity (*Helvering* v. *Seatree,* 72 F. (2d) 67, App. D. C., 1934; *Siegel* v. *Commissioner,* 20 B. T. A. 563, appeal dismissed 59 F. (2d) 1055, C. C. A. 6th, 1931); and an assignment of a dividend accompanied by a transfer of the dividend-paying stock (*Matchette* v. *Helvering,* 81 F. (2d) 73, C. C. A. 2d, 1936, cert. den. 298 U. S. 677). There is no logical distinction between these types of income and an assignment of insurance renewal commissions where the assignor has completely divested himself of control over the income. Accordingly, the decision of the Court below simply recognizes the fundamental principle that the income tax attaches only to the person owning the right to receive or control the income.

Conclusion.

It is respectfully submitted that there is no conflict of decisions involved, that since this Court has already twice denied certiorari in comparable cases, the legal issue is plainly not of such public importance as to impel an exercise of this Court's jurisdiction, and that the petition for a writ should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 205

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner,

v.

GERALD A. EUBANK.

BRIEF FOR THE RESPONDENT

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October, 1940.

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1. The taxable status of assigned income depends upon ownership or control of the property which produces the income and since the respondent did not retain any such ownership or control he is not taxable on the income.

2. The contract right to receive the renewal commissions in question even though it may have resulted from services of the assignor constituted a property right capable of assignment and the disposition of that right did not correspond to an assignment of earnings. Lucas *v.* Earl, 211 U. S. 111. Distinguished ---------- 4

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GUY T. HELVERING, Commissioner of Internal Revenue,
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v.

GERALD A. EUBANK.

BRIEF FOR THE RESPONDENT

Opinions Below

The opinion of the Board of Tax Appeals (R. 14)* is reported in 39 B. T. A. 583. The opinion of the Circuit Court of Appeals (R. 71) is reported in 110 F. (2d) 737.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on April 12, 1940 (R. 73). The petition for a writ of certiorari was filed July 3, 1940, and granted October 14, 1940 (R. 78). The jurisdiction of this Court rests on Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

Statement

In his statement of the question presented, the petitioner speaks (Petitioner's Brief, p. 2) of renewal com-

* References to the Record are to the page numbers of the original record. The printed transcript was not received in time to permit references to the page numbers thereof.

missions on policies "sold" by the respondent. It should be noted that the respondent herein, whether as a partner or as an individual proprietor, was a *general* agent of the life insurance companies, not a subagent; and that the commissions in question did not result solely from his efforts, but from those of his partner and the subagents as well (R. 43-58). To put it differently, the right to commissions which the taxpayer assigned is not quite accurately described as direct compensation for his personal services, but rather as one of the residual assets of a business formerly carried on by him.

In his presentation of the facts, the petitioner states (Petitioner's Brief, p. 3) that the respondent assigned "his interest in the renewal commissions." We wish to point out that the respondent assigned whatever interest he had in the agency contracts (R. 15, 17-19). However, in our view, this distinction is immaterial for the reason that no matter whether the assignment be looked upon as an assignment merely of commissions or of a contract right, the substance of the transaction was the same. The agency contracts had completely terminated prior to the assignments except for the respondent's right to receive the renewal commissions. This right, which was not conditioned on the rendition of future services by the respondent (R. 41), was the only right left in the contracts; and when the respondent effectively assigned it to another, he completely divested himself of whatever rights he possessed in the contracts.

Summary of Argument

1. We agree with the position taken by the Government in *Helvering* v. *Horst*, No. 27, that under the principles of *Helvering* v. *Clifford*, 309 U. S. 331, the status of assigned income for income tax purposes turns upon

the fact of ownership or control, actual or constructive, of the property which produces the income. Accordingly, if the transferor has completely divested himself of ownership or control over ~~his~~ the income and the property which produces it, as did the taxpayer in the instant case, such income is not taxable to him, but to the assignee.

2. *Lucas* v. *Earl,* 281 U. S. 111, which held that a husband could not escape tax by assigning income which was dependent upon his future services is merely an application of the rule that the income is taxable to the individual who owns or controls the income-producing property. The *Earl* case related to an assignment of the direct earnings of the assignor and hence is distinguishable from the instant situation which involves not an assignment of the earnings of the respondent, but rather of a separate income-producing contract right received by the respondent in the course of his business. That this contract right resulted in part from the services of the assignor should not make it different from any other property right, the complete transfer of which shifts tax to the assignee. This court has held that an assignment of trust income by a life beneficiary frees him from tax on the assigned income. *Blair* v. *Commissioner,* 300 U. S. 5. It has also been held by the lower courts, without conflict, that an assignment of patent royalties, *Nelson* v. *Ferguson,* 56 F. (2d) 121 (C. C. A. 3rd, 1932), cert. den. 286 U. S. 565, or an assignment of dividends, *Matchette* v. *Helvering,* 81 F. (2d) 73 (C. C. A. 2d, 1936), cert. den. 289 U. S. 677, where the assignor surrenders ownership of the property from which the income emanates, relieves the assignor of tax. If the owner of inherited or purchased property is able to shift tax on the income by disposing of the property, there is no sound reason for withholding that privilege from one who has, through personal effort, created or acquired a

property right, such as a right to renewal commissions. Section 22(a) of the Revenue Act of 1932, which defines gross income, makes no distinction between income produced by a contract right emanating from compensation for personal services and any other kind of income.

The *Earl* case does not lay down any hard and fast rule that earnings are always taxable to the earner. This is conclusively shown by the fact that if Earl is still alive and living in California, which is now a community property state, he is taxable on only half of his earnings, his wife being taxable on the other half. *U. S.* v. *Malcolm,* 282 U. S. 792, following *Poe* v. *Seaborn,* 282 U. S. 101. The weight of authority is to the effect that the doctrine of *Lucas* v. *Earl* is applicable only to assignments of income which is in some degree owned or controlled by the assignor.

Argument

1. The taxable status of assigned income depends upon ownership or control of the property which produces the income; and since the respondent did not retain any such ownership or control, he is not taxable on the income.

The Government's first point is that the general principles discussed in its brief in *Helvering* v. *Horst,* No. 27, require the taxpayer herein to remain liable for tax on the income received by his assignee. We submit that, on the contrary, these principles require the opposite conclusion. In its brief in the *Horst* case, the Government relies primarily on *Helvering* v. *Clifford,* 309 U. S. 331 and on *Reinecke* v. *Smith,* 289 U. S. 172. In the *Smith* case, this Court cited *Burnet* v. *Leininger,* 285 U. S. 136 and *Lucas* v. *Earl,* 281 U. S. 111, as authority for the following statement (289 U. S. at 177):

> "This Court has repeatedly said that such an assignment, *where the assignor continued to own the corpus,*

does not immunize him from taxation upon the income." (Italics supplied.)

he decision in the *Clifford* case was merely an applica-on of this rule. It was held that the grantor of a short erm trust remained taxable on the trust income, notwith-tanding that such income was set apart for his wife, be-ause he had retained so many of the attributes of owner-hip of the trust corpus, that his ownership of that corpus id not cease, for income tax purposes, with the creation f the trust.[1]

The essential corollary of the rule enunciated in the *mith* case, *supra*, must be that if the transferor does *not* ontinue to own or retain control over the property which roduces the income, he is no longer taxable. Thus, in a

[1] In a footnote on pages 5 and 6 of his brief, the peti-ioner has sought to inject a new issue into the instant case, o wit, the nature of the trust to which the commissions in uestion were assigned, presumably to show that the *Clif-ord* case is applicable. We submit that it was improper or the petitioner to introduce into the case facts which re not contained in the record. The Government has hroughout treated the trust as a separate taxable entity, nd the application of the trust income has never been raised before. Thus, the Board in its opinion states (R. 22): "* * * the pleadings raise no question about the se of the commissions in question, so that this is not a case of income attributable to an assignor or settlor by reason of application of the income for his use or benefit." In any event, the unfavorable inferences in the petitioner's footnote could be overcome if necessary. Thus, it could be shown that the taxpayer was in fact taxed with the premiums on policies of insurance covering his life and with income that was used to discharge his obligations. More-over, we believe that if the trust income and deductions were merged with those of the taxpayer, the aggregate tax, because of losses sustained by the trust, would be less than the amount actually paid.

case like *Blair* v. *Commissioner, supra,* where the assignor had nothing to assign but his inherited right to income—he was merely the life beneficiary of a testamentary trust—and he assigned that right, retaining nothing, he was not taxed on the income. On the other hand, in *Burnet* v. *Leininger, supra,* where a member of a partnership assigned to his wife, without making her a partner, a portion of his share of the partnership profits, he was taxed for the reason that his efforts and the continued ownership of his partnership interest were essential to the realization of income by his assignee.[2] In other words, he still retained a measure of control and ownership over the property which produced the income. Similarly, in *Lucas* v. *Earl,* where the assignment was merely of future earnings, Earl continued to exercise control over the income because only through his personal efforts could any income be realized. The will to work is not susceptible of assignment and hence an assignment of future earnings can never convey the property which produces the income. On the other hand, in an assignment, not of earnings, but of the *product* of past earnings, where the assignee's right to the income from that product is in no way dependent upon the will of the assignor, the latter has not retained the property which gives rise to the income. The distinction is clearly brought out in *Hall* v. *Burnet,* 54 F. (2d) 443 (App. D. C. 1931), cert. den. 285 U. S. 552, a case on all fours with the present one, as follows:

> "* * * if what was here sought to be conveyed from the husband to the wife was salary, or personal earnings, the same would still be taxable to him though he never actually received it, but in the view we take of the case, what was assigned was neither income nor

[2] The cases cited on page 10 of petitioner's brief—*Balkwill, Kàsch* and *Rossmoore*—involved similar unsuccessful attempts to make the assignee a partner.

earnings, but property. It was not an assignment of future earnings but the transfer of a property right, and though this property right gave rise to future income, uncertain and contingent though it might be as to amount, that fact does not destroy the distinction. In this case, the contract between appellant and the insurance company gave him a property right in all renewal premiums on all business written for the company by him or by others during the period of the contract. Undoubtedly, his right to these commissions would survive his death and would pass to his estate to the same extent and in the same way as other property which he then possessed. In these circumstances, it is obvious that the right was fixed and certain, and was independent of any future service to be rendered by him. Any uncertainty in the situation concerned only the amount; but the agent's rights as against the insurance company were established. When, therefore, the contract was assigned to his wife, a property right passed to her, as capable of assignment as any other sort of property; for instance, as rents to accrue from a lease for a term of years, or royalties from a patent."

Making use of the metaphor employed by Mr. Justice HOLMES in the *Earl* case, the fruits are taxable to whoever owns the tree. This is the ground upon which the Government rests in the *Horst* case, and we believe it to be correct. However, in the instant case the Government has confused the seed with the tree. The taxpayer's services, *i. e.*, the seed, produced the right to renewal commissions, which would correspond to the tree; and the renewal commissions themselves when actually paid would correspond to the fruit. Similarly, the labors of an author might culminate in a copyright, or the services of an inventor might produce a patent. In each case the seed would be the services and the tree would be the copyright or the patent.

The royalties payable under the copyright or the patent would constitute the fruit. If the author or inventor were to assign his copyright or patent to his wife, the Government would not contend that he remained taxable on the royalties received by his wife. See *G. C. M. 19,213,* 1937-2 C. B. 220, cited on page 14 of the Government's brief; also *Lilienfeld* v. *Commissioner,* 35 B. T. A. 391, acquiesced in by the petitioner C. B. 1937-1, 15. These situations are perfectly analogous to the instant case: The efforts of the taxpayer produced the right to renewal commissions; he assigned this right to another, retaining no ownership or control whatsoever. The right produced income. What logic can there be in taxing to the assignor the produce of one kind of right created by personal effort and taxing to the assignee the produce of another kind of right so created? Suppose the insurance company in the instant case had compensated the taxpayer by assigning to him a patent and the taxpayer had in turn assigned the patent to another. Would the Government continue to maintain that the taxpayer remained taxable on the income from the patent? A reasonable answer to these questions compels the conclusion that an assignment of a property right derived from past earnings, like the assignment of any other property right, relieves the assignor of tax.

2. **The contract right to receive the renewal commissions in question, even though it may have resulted from services of the assignor, constituted a property right capable of assignment; and the disposition of that right did not correspond to an assignment of earnings. Lucas v. Earl, 281 U. S. 111 distinguished.**

The Government rests virtually its whole case on *Lucas* v. *Earl,* which involved the question of whether Earl could be taxed on all the salaries and attorney fees earned by him in 1920 and 1921, or whether he should be taxed on only half of them, in view of a contract he had made with his

wife many years before the income tax law became effective, by which they agreed that any property either of them might thereafter acquire, whether by earnings or otherwise, should be treated as owned by them jointly. In his brief opinion holding that Earl could not escape tax on his salaries and fees by an anticipatory arrangement, Mr. Justice HOLMES made the statement that the "statute could tax salaries to those who earned them."

The commissions involved in this case were not wholly the product of services personally rendered by the taxpayer.[3] Assuming, however, *arguendo,* that the commissions were entirely the result of respondent's individual efforts, *Lucas* v. *Earl* does not require that they be taxed to him. That case related to earnings *qua* earnings and

[3] The respondent was a general agent, not a subagent, of the insurance companies and the commissions in question resulted from policies sold by others as well as himself. By far the greatest portion of such commissions was derived from the Hart & Eubank partnership contract with the Aetna Life Insurance Company (R. 42). The Agency created by that contract was to Hart as well as Eubank, and it cannot plausibly be said that the commissions arising out of that contract were attributable solely to the efforts of Eubank. Therefore, even under a literal application of the *Lucas* v. *Earl* doctrine, the commissions in question should not be taxed to the respondent assignor. The nature of a life insurance general agency is indicated in *Van Meter* v. *Commissioner,* 22 B. T. A. 1202 (at 1203), where the Board denied personal service classification to a corporation engaged in that business on the ground that, although the stockholders contributed personal services to the conduct of the agency, most of the income came from commissions paid on insurance written by employed agents. *Edwards* v. *Keith,* 231 Fed. 110, cert. den. 243 U. S. 638, relied on by petitioner (pp. 6-7 of his brief) to establish that life insurance renewal commissions constitute compensation for personal services, did not pose that question. The point was conceded and the only issue was whether the income accrued before or after March 1, 1913.

not to a separately disposable contract right received as compensation for services. If Earl had received a fee in the form of an interest in a patent and had assigned that interest to his wife, he would have escaped tax on the patent royalties. *G. C. M. 19,213, supra, Lilienfeld* v. *Commissioner, supra; Nelson* v. *Ferguson,* 56 F. (2d) 121 (C. C. A. 3rd, 1932), cert. den. 286 U. S. 565. This result would follow even if the patent, when received by Earl, had no ascertainable value and hence added nothing to his taxable income. The number of contract rights received as compensation which have no immediately ascertainable value could be multiplied. Thus, the receipt of a right to the use of characters in a comic strip (*Fontaine Fox,* 37 B. T. A. 271), a right to a pension (*Geo. O. Knapp,* 40 B. T. A. 1144), a right to good will (*Helvering* v. *Seatree,* 72 F. (2d) 67, App. D. C. 1934), does not, when received, add anything to the taxable income of the recipient because it is then incapable of reasonably accurate valuation. Yet the assignment of such a right operates to shift the tax on the resulting income to the assignee. Similarly, in the instant case, respondent, on termination of his agency contract, received an assignable right to renewal commissions. This right may have constituted compensation for services, but the commissions themselves did not. To repeat the metaphor previously used, the tree, *i. e.,* the right, was received by the respondent and transferred to another who received the fruit, *i. e.,* the renewal commissions.[4] The efforts of the taxpayer constituted merely the seed from which the tree grew.

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[4] It was not certain at the time of transfer that the tree would ever bear fruit. That depended solely on the payment of future premiums by the policy holders. But the ownership of the tree had irrevocably passed to the assignee. The Board erroneously concluded (R. 25) that the taxpayer's assignee did not acquire any legal title to

The Government seizes upon the statement in the *Earl* opinion that the "statute could tax salaries to those who earned them" as a springboard from which to establish a sweeping doctrine that earnings are always taxable to the earner. However, this Court itself has pointed out that no such sweeping doctrine was intended to be set up by the *Earl* decision, for Earl himself, if he is still alive and earning salaries and fees, is no longer taxable on all of his compensation for personal services. California, in which he resided, is now a community property state, and as a consequence Earl would be taxable on only half of such compensation. *U. S.* v. *Malcolm,* 282 U. S. 792, fol-

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the future commission payments. In reaching this conclusion, it confused the assignment of future *earnings* with the assignment of future *payments* arising out of past earnings. That the assignment of future income payments over which the assignor retains no control conveys a property right is established by cases like *Blair* v. *Commissioner, supra,* and *Hall* v. *Burnet, supra.* The Board's remark (R. 25) that the "insurance companies did not accept in writing the assignment of future commissions made by petitioner," and that, although they paid the commissions to the assignee, "they were not legally obligated to do so" was wholly gratuitous and at variance with the stipulated facts. The stipulation contains copies (R. 61, 67) of the acknowledgments by the insurance companies of the receipt of the instruments of assignment, and the stipulation specifically provides (R. 42) that the commissions were paid to the assignee *by virtue of such instruments.* Similarly, the Board's observation (R. 25) that the rights assigned were *future rights* is without foundation. The agency contracts had terminated at the time of assignment and could not thereafter be altered by either the assignor or the insurance company. The assignee acquired an indefeasible right *in praesenti* to the commissions which might be payable in the future; the *amounts* to become payable were contingent and unascertained, but not the right to receive such amounts: *Knevals* v. *Blauvelt,* 82 Me. 458, 19 Atl. 818 (1890).

lowing *Poe* v. *Seaborn*, 282 U. S. 101; *Goodell* v. *Koch*, 282 U. S. 118; and *Hopkins* v. *Bacon*, 282 U. S. 122.

In *Poe* v. *Seaborn* this Court referred to the *Earl* case and said (282 U. S. at p. 117):

> "• • • We held that, assuming the validity of the contract under local law, it still remained true that the husband's professional fees, earned in years *subsequent to the date of the contract*, were his individual income, 'derived from salaries, wages, or compensation for personal services'. • • • The very assignment in that case was bottomed on the fact that the earnings would be the husband's property, else there would have been nothing on which it could operate." (Italics ours.)

The Government argues that this Court in the *Earl* case put no stress on the fact that the compensation involved therein represented future earnings, but we submit that the italicized portion of the above quotation from *Poe* v. *Seaborn*, unless it is to be shorn of all meaning, clearly indicates that weight *was* attached to the fact that in the *Earl* case, control of the income (and hence ownership for tax purposes) remained in Earl.

The weight of authority in the lower courts, notably the court below, is also to the effect that *Lucas* v. *Earl* does not require the assignor to remain taxable where, as in the instant case, the income received by the assignee was not in any way subject to the control of the assignor.[5]

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[5] Decisions of the court below: *Commissioner* v. *Field*, 42 F. (2d) 820 (C. C. A. 2nd, 1930); *Lowery* v. *Helvering*, 70 F. (2d) 713 (C. C. A. 2nd, 1934); *Rossmoore* v. *Commissioner*, 76 F. (2d) 520 (C. C. A. 2nd, 1935); *Matchette* v. *Helvering*, 81 F. (2d) 73 (C. C. A. 2nd, 1936), cert. den. 298 U. S. 677; *Shanley* v. *Bowers*, 81 F. (2d) 13 (C. C. A. 2nd, 1936); *Horst* v. *Commissioner*, 107 F. (2d) 906 (C. C. A. 2nd, 1936). Of these cases, the *Rossmoore* case was decided in favor of the Government and we believe that the

The cases cited by the Government on pages 11 and 12 of its brief nearly all involved assignments of income which was controlled to some extent by the transferor.[6] The line of demarcation between cases controlled by *Lucas* v. *Earl* and those to which it is not applicable is succinctly pointed out by Judge LEARNED HAND in his opinion in *Rossmoore* v. *Commissioner*, 76 F. (2d) 520 (C. C. A. 2d, 1935), wherein he states (at p. 521):

> "• • • That decision [referring to *Burnet* v. *Leininger*, 285 U. S. 136] was avowedly a corollary of *Lucas* v. *Earl*, 281 U. S. 111, a case where the husband gave an interest in his future earnings to his wife. *Nothing turned upon the form of the transfer and everything upon the fact that the assignor remained in control of the income, since it was only through his*

Horst case was incorrectly decided in favor of the taxpayer; but the opinions in all of the cases cited support the statement in the text.

Decisions by other courts: *Hall* v. *Burnet*, 54 F. (2d) 443 (App. D. C. 1931), cert. den. 285 U. S. 552; *Commissioner* v. *Ross*, 83 F. (2d) 18 (C. C. A. 6th, 1938); *Nelson* v. *Fergusont*, 56 F. (2d) 121 (C. C. A. 3rd, 1932), cert. den. 286 U. S. 565; *Commissioner* v. *O'Donnell*, 90 F. (2d) 907 (C. C. A. 9th, 1937), reversed on another point 303 U. S. 370; *Helvering* v. *Seatree*, 72 F. (2d) 67 (App. D. C. 1934).

Decisions by the Board of Tax Appeals: *Walter L. Ross*, 30 B. T. A. 496 (1934), approved sub nom. *Commissioner* v. *Ross*, *supra*; *Julius E. Lilienfeld*, 35 B. T. A. 391 (1937); *Fontaine Fox*, 37 B. T. A. 271 (1938); *Geo. O. Knapp*, 40 B. T. A. 1144 (1939); *Eugene Siegel, Executor*, 20 B. T. A. 563, appeal dismissed 59 F. (2d) 1055 (C. C. A. 6th, 1931); *J. H. Philbin*, B. T. A. Docket No. 81,815, memorandum opinion promulgated August 10, 1936, C. C. H., B. T. A. Service, Par. 9472-R; *Ralph M. Lovejoy*, B. T. A. Docket No. 93,197, memorandum opinion promulgated April 28, 1939, C. C. H., B. T. A. Service, Par. 10,679-S.

[6] The only cases which we believe to be squarely opposed to our position are *Emery* v. *Commissioner*, 78 F. (2d) 437 (C. C. A. 1st, 1935), and, at least in principle,

> *continued efforts that it could be earned.* That is equally true though the assignor be a partner and have only an indirect interest in the earnings through his share in the profits; *any future earnings which he can assign are conditioned upon his continued efforts and remain in that sense at his disposition. That is the critical factor;* the legal scaffolding is of no consequence. * * * " (Italics ours.)

Judge HAND elaborated on this thought in the *Matchette* case (involving tax on an assigned dividend) in which he said (81 F. (2d) at pp. 74, 75):

> "* * * We thought that the doctrine [of *Lucas* v. *Earl* and *Burnet* v. *Leininger*] was limited to the assignment of future earnings, because these were necessarily left within the assignor's power, his continued activity being a condition upon them. Only so could we see how the transfer of earnings differed from that of any other chose in action payable in the future. * * *"

The *Earl* case states that the question turns on the import and reasonable construction of the taxing act. We accept that touchstone, and propose to show by a few examples that the adoption of an unlimited doctrine that earnings are always taxable to the earner would produce

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Van Meter v. *Commissioner*, 61 F. (2d) 817 (C. C. A. 8th, 1933). The reasoning in the *Emery* case seems cloudy in view of the fact that *Hall* v. *Burnet, supra*, is cited with approval; while the *Van Meter* case is distinguishable on its facts. See respondent's brief in opposition to the petition for certiorari, p. 6. *Bishop* v. *Commissioner*, 54 F. (2d) 298 (C. C. A. 7th, 1931), and *Parker* v. *Routzahn*, 56 F. (2d) 730 (C. C. A. 6th, 1932), cert. den. 287 U. S. 606 are clearly distinguishable from *Hall* v. *Burnet* and the present case, and the Government has said so in its brief opposing certiorari in the *Parker* case. See respondent's brief in opposition to the petition for certiorari, page 5.

results that are not merely unreasonable, but absurd. Suppose an agent owning a right to renewal commissions becomes bankrupt and the right to such commissions is sold by the trustee in bankruptcy to an outsider. Would the Government still maintain that the agent was taxable on the commissions paid to the purchaser because they were earned by the agent? Suppose the agent had sold his right to the future commissions, would he be subject to tax not only on the proceeds of sale, but on the larger amount of commissions as well because he had "earned" these commissions? Or suppose the agent had died owning the right to receive the renewal commissions. Application of the sweeping doctrine advocated by the Government would require him to be taxed after his death. This view was specifically rejected in *Seattle First National Bank* v. *Henricksen,* 24 F. Supp. 256 (W. D. Wash., 1938), appeal dismissed 100 F. (2d) 1015) (C. C. A. 9, 1939), which held that the value at the date of death of the right to receive renewal commissions is not taxable to the agent in his final return under Section 42 of the 1934 Revenue Act, requiring the inclusion in such final return of all income accrued up to the death of the taxpayer. To cite one other example of the impracticable results that would follow were this Court to depart from the reasonable rule that income is taxable to the one who owns the property from which it arises: if the agent were to assign the right to commissions to another, without consideration, and were later to become unable to pay the tax, the Government would completely lose tax on such income.

The Government, on page 14 of its brief, cites *G. C. M. 19,213 supra,* in support of its view that a right to income which stems from personal services is to be treated differently from income which derives from a trust (*Blair* v. *Commissioner, supra*) or a patent (*Julius Lilienfeld,*

supra) or stock (*Matchette* v. *Helvering, supra*). We submit, however, that the reasoning of this ruling is specious and finds no support in the statute. The general definition of gross income in Section 22(a) does not distinguish between a right that represents compensation for services and compensation for the use of a patent, dividends, etc. Furthermore, as already pointed out, the royalties from a patent are ordinarily just as much the result of effort on the part of someone as commissions. The only difference between a patent and a right that represents compensation for services is evidential, not substantial; the former is expressed in a document issued by the patent office, the latter may have less formal expression. But leaving aside formalities, both arise out of past services.

The Government closes its brief with the argument that if the decision of the court below is affirmed, the opportunity for tax avoidance will be alarming. We disagree with this conclusion. The present situation is not a common one; few individuals receive compensation in the form of a contract right which may or may not give rise to future income. The principle for which respondent contends in this case would not permit anyone to avoid tax on ordinary income from personal services by assignment before or after the services are performed. The contention of the respondent in this case simply is that a future commissions contract in the nature of a royalty contract, such as is here involved—the income from which is in no way dependent upon future services of the assignor, and the income from which has not yet arisen, and will arise, if at all, by the happening of events over which the assignor has no control—may be assigned so as to relieve the assignor of the tax on the income therefrom *in just the same way that the same sort of property arising from sources other than personal services* may be assigned so as to re-

ieve the assignor of tax. The right to assign a contract of his character arising from personal services offers no more pportunity for tax avoidance than the right to assign a imilar contract arising from any other source. There is o sound reason why one who inherits property should be ble to shift tax on the income therefrom by assigning the roperty, while one who acquires similar property by his abors should be denied that privilege.

Conclusion

The judgment of the court below should be affirmed.

Respectfully submitted,

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Of Counsel:
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October, 1940.

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No. 205

In the Supreme Court of the United States

OCTOBER TERM, 1940

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER,

v.

GERALD A. EUBANK

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF

WILLIAM A. SUTHERLAND,
Amicus Curiae.

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MOTION

Now comes the undersigned and moves for leave to file the annexed brief as Amicus Curiae. The undersigned is interested in the decision of this case because he represents a taxpayer who, through personal services, became entitled to a royalty contract giving him a share in the profits to be derived from the distribution of certain copyrighted motion pictures. Immediately upon the completion of the services and before any income arose under the contract, the contract became completely vested in the taxpayer's assignee. The Government now seeks to tax the assignor on the income thereafter arising under said contract and paid to the assignee.

A letter from counsel for the respondent and a letter from the Solicitor General consenting to the filing of this brief has been filed with the Clerk.

WILLIAM A. SUTHERLAND,
First National Bank Building,
Atlanta, Georgia.

BRIEF AMICUS CURIAE

WHERE AN INCOME-PRODUCING CONTRACT IS COMPLETELY ASSIGNED, THE INCOME SUBSEQUENTLY ARISING IS NOT TAXABLE TO THE ASSIGNOR; EVEN THOUGH THE CONTRACT WAS ACQUIRED BY THE PERSONAL SERVICES OF THE ASSIGNOR.

The present case does not involve any attempted assignment of income alone, but an assignment of property from which the income subsequently arose. The assignor's control was gone before any income accrued.

Respondent taxpayer was the owner of a contract entitling him to a certain percentage of future premiums, if any, paid on insurance policies written by him. This contract right was fully vested in him and he had no further services to perform. Before any of the income here in question arose he assigned the contract irrevocably and lost all control of same. The income which was entirely uncertain at the time of assignment ripened after the assignment and came directly to the assignee. The thing here assigned was not income but the thing from which the income flowed.

The Government contends, however, that the decision of this Court in *Lucas* v. *Earl,* 281 U. S. 111, makes the income taxable to the assignor because the contract right in question arose from personal

services of the assignor. The Government rests its case upon that proposition. *Lucas* v. *Earl* does not support it.

Lucas v. *Earl* involved an effort to assign income without the assignment of the thing from which the income arose—in that case, personal services. This Court held that such an assignment would not relieve the assignor of the tax on the compensation. The income remained fully subject to the control of the assignor until the moment of its vesting. In fact as was said by this Court in *Poe* v. *Seaborn,* 282 U. S. 101, 118:

> "The very assignment in that case (Lucas *v.* Earl) was bottomed on the fact that the earnings would be the husband's property, else there would have been nothing on which it could operate".[1]

The same rule applies to the assignment of *income from property,* where an assignment is made merely of the income and the assignor retains control over the property from which the income arises and may thus defeat the assignment. There too income is taxed to the assignor, despite the assignment.[2] In other words wherever there is a mere

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[1] In the case of *Lucas* v. *Earl* the services were to be performed in the future. However, if the services had already been performed and there was the usual cash consideration to be paid therefor, it would no doubt follow from the decision of *Lucas* v. *Earl* that the person performing the services and in whom the right to this consideration had become vested could not relieve himself of tax by thereafter assigning the right to collect the compensation.

[2] See footnote 6, page 12, Government Brief in *Helvering* v. *Horst,* No. 27, and the cases there cited.

assignment of income which is not complete until the income arises—whether the income comes from personal services or from property—the assignor remains taxable on the income. *Lucas* v. *Earl* is merely an application of this sound doctrine.

That this is the proper explanation of *Lucsa* v. *Earl* is clearly recognized by the Solicitor General in the petition for certiorari and in the brief on the merits in *Helvering* v. *Horst,* No. 27, and in other government briefs recently filed in this Court.[3] The Solicitor General there correctly ex-

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[3] In the petition for certiorari in *Helvering* v. *Horst,* No. 27 Oct. Term, 1940, the Solicitor General said:

> "The decision below is not only in conflict with the *Clifford* case, but the court below has ignored the settled rule relating to the assignor's taxability upon assigned future income. *Lucas* v. *Earl,* 281 U. S. 111, in which the rule was first established, dealt, it is true, with the income from personal services. But the basis of the decision is the broad principle that tax liability remains the same whether the income is assigned before or after its receipt; in this doctrine there is no room for distinction according as the future income is derived from the taxpayer's services or his ownership".

The court's attention is directed to the whole of the brief on the merits in the *Horst* case and to the quotation therein from *Reinecke* v. *Smith,* 289 U. S. 172, 177, where *Lucas* v. *Earl* is cited.

In the petition for certiorari in *Helvering* v. *Clifford,* No. 383, Oct. Term, 1939, the Solicitor General said (p. 8):

> "2. An additional ground for the imposition of the tax, wholly apart from the trust provisions in Section 166, is that the instant case falls within the decisions holding that an assignment of future income either from earnings or from property owned by the assignor does not relieve him of lia-

plains that *Lucas* v. *Earl* is equally applicable to income from property and to income from personal services and that the decision is based upon the principle that wherever the fruit and not the tree is assigned, the owner of the tree—be it personal services or property—on which the income ripens is taxable on the income. It should therefore be clear that where as here the thing assigned is not

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bility for tax. This case presents a substantial conflict in principle with those decisions. *Lucas* v. *Earl*, 281 U. S. 111 (earnings from services); *Burnet* v. *Leininger*, 285 U. S. 136 (partnership profits); * * * *Ward* v. *Commissioner*, 58 F. (2d) 757 (C. C. A. 9th) (rents); *Rosenwald* v. *Commissioner*, 33 F. (2d) 423, 426 (C. C. A. 7th) certiorari denied, 280 U. S. 599 (rents); *Bing* v. *Bowers*, 22 F. (2d) 450, 454 (S. D. N. Y.), affirmed 26 F. (2d) 1017 (C. C. A. 2d) (income from property). The significant factor in the foregoing cases of assignments of income from property or property rights is that since the assignor failed to dispose of the underlying property or property rights which produced the income, he could not by anticipatory arrangements deflect such income for tax purposes."

In the brief on the merits of the *Blair* v. *Helvering*, No. 247, Oct. Term, 1936, the Solicitor General said (p. 34):

> "In all these cases, the courts have applied though not always consistently, the general rule that income from personal services is taxable to the one who earns it; that income from property is taxable to the owner or to the one retaining control of the property producing the income, and that any anticipatory arrangement designed in such cases to divert income to another is ineffective to defeat the tax. *Lucas* v. *Earl*, 281 U. S. 111; *Burnet* v. *Leininger*, 285 U. S. 136; *Corliss* v. *Bowers*, 281 U. S. 376."

income, but the thing from which the income arises —the tree itself—the decision in *Lucas* v. *Earl* does not support any right to tax the income to the assignor. In such case, control in the assignor —which was the determining factor in *Lucas* v. *Earl*—is entirely lacking.[4]

In its attempted extension of the doctrine of *Lucas* v. *Earl* to a case like the present the Government is seeking to ignore for tax purposes a complete and absolute assignment of the income producing property from which the income in question flowed, merely because that property came to the assignor by reason of personal services which he had performed. *Lucas* v. *Earl* is not authority for any such proposition. *If* the respondent had attempted to assign the income from renewal commissions contract, *while retaining the ownership and control over the contract from which they flowed,* the decision in *Lucas* v. *Earl* would make the income taxable to respondent.

If we are to tax the owner of the tree on the fruit thereof, we must determine who owns the tree. In the present case the personal services of the respondent taxpayer did not constitute the tree on which the income grew. Those services were completed long before any of the income in question arose and at the time those services were completed it could not be ascertained whether any income would ever arise or what the amount would be. That would depend upon a combination of circumstances which might or might not occur in

[4] It is somewhat surprising now to find the Solicitor General in this case, immediately following the *Horst* case, contending for a construction of *Lucas* v. *Earl* completely at variance with that so recently urged.

the future. The personal services which respondent had performed were merely the seed from which the tree grew. Those services merely perfected the contract right. They did not bring any income into being. Time and future circumstances were required to produce income, circumstances in no way subject to the control of the respondent. Before any income arose the person who had performed the services and produced the contract was entirely out of the picture, and when he stepped out of the picture *he did not assign any income.* There was none to assign. He assigned only a right which might in the future produce income. That was the tree. His personal services were merely the seed. There is no reason to extend *Lucas* v. *Earl* so as to tax the person who supplies the seed.

If the supplier of the seed, rather than the owner of the tree were taxable, when the seed happens to be personal services, the same rule should apply where the seed is property owned by an assignor. For example: Suppose the owner of a laboratory leases the laboratory for six months for $3,000, and an agreement that he will be paid one per cent (1%) of the gross proceeds over a period of ten years to come from any discoveries made during the lease period. Suppose that after the expiration of the lease he assigns the royalty contract to another but makes no transfer of any interest in the laboratory. The principle contended for by the Government would require that the royalties thereafter accruing on said contract be taxed to the owner of the laboratory, a proposition patently erroneous. And yet if the income producing con-

tract is to be ignored and the income therefrom treated as income from the laboratory within the meaning of the cases referred to in *footnote* 2 supra, that conclusion would be required. The effort of the Government here to ignore the income producing contract and to treat the income therefrom as ordinary income from the personal services of respondent is just as unreasonable.

The point is that the *origin* of a contract, such as the renewal commissions contract here in question, is of no importance in determining the taxability of the income therefrom. It matters not whether it arose from personal services of the assignor, or from property still retained by him or from any other source. The income is taxable to the person who owns the contract when the income arises, and *Lucas* v. *Earl* intimates nothing to the contrary. When respondent in this case divested himself of all interest in this contract, none of the income in question had arisen and he had no more control over the income thereafter to arise from such contract, before or after the income arose, than the owner of real estate, after a completed gift thereof, would have over the rents subsequently to arise therefrom.

The distinction between this case and the case of *Lucas* v. *Earl* was clearly recognized by the Court of Appeals for the District of Columbia in the case of *Hall* v. *Burnet,* 54 F. (2d) 443, cert. den. 285 U. S. 552, a case on all fours with the present case, where the court announced the principles properly applicable in the following language (p. 444):

> "From this (the decision in Lucas v. Earl) it is obvious that if what was here

sought to be conveyed from the husband to the wife was salary, or personal earnings, the same would still be taxable to him though he never actually received it, but in the view we take of this case, what was assigned was neither income nor earnings, but property. It was not an assignment of future earnings but the transfer of a property right, and though this property right gave rise to future income, uncertain and contingent though it might be as to amount, that fact does not destroy the distinction. In this case, the contract between appellant and the insurance company gave him a property right in all renewal premiums on all business written for the company by him or by others during the period of the contract. Undoubtedly, his right to these commissions would survive his death and would pass to his estate to the same extent and in the same way as other property which he then possessed. In these circumstances, it is obvious that the right was fixed and certain, and was independent of any future service to be rendered by him. Any uncertainty in the situation concerned only the amount; but the agent's rights as against the insurance company were established. When, therefore, the contract was assigned to his wife, a property right passed to her, as capable of assignmet as any other sort of property; for instance, as rents to accrue from a lease for a term of years, or royalties from a patent."

The correctness of this decision was recognized by the 7th and 6th Circuits in the cases of *Bishop* v. *Commissioner,* 54 F. (2d) 298, and *Parker* v. *Routzahn,* 56 F. (2d) 730, cert. den. 287 U. S. 606; and it is difficult to understand the basis upon

which the correctness of the decision was questioned by the 8th Circuit in *Van Meter* v. *Commissioner,* 61 F. (2d) 817, in view of the fact that thta court expressly recognized the correctness of the decision in *Nelson* v. *Ferguson,* 56 F. (2d) 121, cert. den. 286 U. S. 565.[5]

Taxation, as this Court has frequently said, *is a practical matter. Practicality,* as well as fairness, *dictates that the judgment below be affirmed.*

It is entirely fair and practical that a person owning property or performing services should pay tax on the income therefrom, even though he permits others to enjoy the income. On the other hand, it would be entirely unfair and impractical to tax an assignor on income arising from a contract or property—from whatever source that contract or property arose—where the property or contract and all control thereof has passed entirely out of the assignor long before it is even determined what income if any will ever arise therefrom. Take these insurance renewal commission contracts for example. Generally commissions are payable for nine years after the agent has severed his connections with the company. If the Government's theory is correct, an agent who has completed his services and has completely disposed of his contract could be taxed on income arising from the contract nine years after the complete assignment, although the amount of the commissions was entirely uncertain at the time of the assignment. Such a result is as undesirable as it is unfair, and

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[5] See the discussion of these insurance commission cases in the Respondent's brief in opposition to certiorari.

this Court certainly has not said anything in any of its previous opinions which could lead anyone to believe that it considers that the income tax law requires a holding so out of keeping with economic reality.

The Government suggests that the affirmance of the decision below will afford an alarming opportunity for tax avoidance. The right to transfer a contract of this character, and thus to shift the income for tax purposes to the assignee, affords no greater opportunity for tax avoidance than does the right to transfer any other income producing property or contract. In each case taxes are avoided only by the complete surrender of the property which gives rise to the income.

CONCLUSION

The decision of the Court below is in accord with the weight of authority, is correct, and should be affirmed.

Respectfully submitted,

W. A. SUTHERLAND,
Atlanta, Georgia,
Amicus Curiae.

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IN THE

Supreme Court of the United States

October Term, 1940

No. 205

GUY T. HELVERING, Commissioner of Internal Revenue,

Petitioner,

v.

GERALD A. EUBANK,

Respondent.

PETITION FOR REHEARING

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IN THE

Supreme Court of the United States

October Term, 1940

GUY T. HELVERING, Commissioner of Internal Revenue, *Petitioner*, *v.* GERALD A. EUBANK, *Respondent.*	No. 205

PETITION FOR REHEARING

The respondent herein prays for a rehearing and a reargument in this case and for a stay of mandate until such rehearing and reargument have been had. The opinion of this Court was rendered and judgment entered on November 25, 1940.

The sole question involved is whether renewal commissions, received by respondent's assignee during 1933, under general agency contracts voluntarily assigned by respondent in 1924 and 1928, are to be included in respondent's taxable income for the year 1933.

As the grounds for this petition, the respondent respectfully urges:

1. If the Court decided the case on the assumption that the assignments were for the benefit of, or reserved any rights to, the respondent, the decision was erroneous on the record.

The opinion of the Court states:

> "No purpose of the assignments appears other than to confer on the assignees the power to collect the commissions, which they did in the taxable year. The Government and respondent have briefed and argued the case here on the assumption that the assignments were voluntary transfers to the assignees of the right to collect the commissions as and when they became payable, and the record affords no basis for any other."

We assume that the statement just quoted does not mean that the case was decided on the theory that the assignments were mere assignments for collection for the benefit of the assignor, or that anything in the assignments (R. 33-34, 36-37), or in the terms of the trust instrument (not in the record) under which the assignee was trustee, provided such benefits for the assignor as to justify taxing to him the payments received by the assignee as a result of the assignments.

The assignments were concededly voluntary, *i.e.*, they were gifts. Nothing in the record, however, justifies treatment of the assignee as anything except a separate and independent entity. The government throughout treated the trust as such and raised no question as to the application by the assignee of the commissions collected by it.* As the Board of Tax Appeals stated in its opinion (R. 13),

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*In its brief in this Court the government suggested that if the case were remanded to ascertain the beneficiaries and nature of the trust, it would offer certain proof (petitioner's main brief, footnote, pp. 5-6). If this issue had been raised at the trial, respondent would have had the opportunity to introduce countervailing evidence which existed (see respondent's main brief, footnote, p. 5).

"the pleadings raised no question about the use of the commissions in question, so that this is not a case of income attributable to an assignor or settlor by reason of application of the income for his use or benefit." As this issue was not raised by the pleadings or tried, the decision of this Court will inevitably be taken as establishing a general principle of law not related to that issue.

2. This case is not controlled by *Helvering* v. *Horst*, the so-called "companion case".

In the *Horst* case the Court stated:

> "The sole question for decision is whether the gift, during the donor's taxable year, of interest coupons detached from the bonds, delivered to the donee and later in the year paid at maturity, is the realization of income taxable to the donor."

In holding the donor of the coupons taxable, the Court characterizes in the following words various decisions thought to require that result:

> "Underlying the reasoning in these cases is the thought that income is 'realized' by the assignor because he, who owns or controls the source of the income, also controls the disposition of that which he could have received himself and diverts the payment from himself to others as the means of procuring the satisfaction of his wants. The taxpayer has equally enjoyed the fruits of his labor or investment and obtained the satisfaction of his desires, whether he collects and uses the income to procure these satisfactions or whether he disposes of the right to collect it as the means of procuring them."

In the *Horst* case the assignor may thus have been taxable for one or both of two reasons, first, because he

continued to "own or control the source of the income", or second, because he, during the taxable year in question, obtained "the satisfaction of his wants" by disposition during that year of his right to receive income.

Neither of those reasons exists in the present case.

First, this is clearly not a case in which the taxpayer continued to "own or control the source of the income." The assignment was of the entire contracts owned by the assignor, including the right to receive payments thereafter becoming due thereunder. Nothing whatsoever was retained by the assignor; the assignments divested Eubank of all interests in the contracts.* They vested in the assignee not only the right to collect and to use moneys due under the contracts, but also the right to sell, assign, transfer or cancel the contracts, including the right to receive payments thereunder, without any further action by the assignor. In brief there was a transfer of everything that the assignor had, and nothing remained for the assignor to do to perfect the assignee's right to receive payment.

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*The transfer of the Canada Life contract in 1924 was in the following language: "For a valuable consideration * * * Eubank hereby sells, assigns and transfers to Union Trust Company * * * all his right, title and interest in and to a certain agreement * * * between Canada Life Insurance Company * * * and Eubank * * * made in connection with the employment by said assurance company of said Eubank as a branch manager for said company, together with all moneys payable or to become payable to the said Eubank, under and by virtue of the terms of said contract" (R. 36-37).

While the assignment in 1928 (R. 33-34) is not in its language as clearly an assignment of the entire Aetna contract, it does, it is submitted, nevertheless transfer the respondent's entire interest therein. Without pursuing this point in this petition, it must be clear that, if the decision is wrong as to the first transfer certainly the Court will wish to reconsider the opinion on that account, and that will be time enough to go into the language of the transfer of the second contract.

It must be remembered that this case does not involve any arrangement set up specially by the taxpayer to postpone the payment to him of compensation for services and thus to create something which might be assigned to another. The general agency contracts here involved are in the traditional and usual form for such contracts.

It may fairly be asserted that in assigning the contract, Eubank was transferring to the assignee the source of the income thereafter receivable thereunder, just as in *Blair* v. *Commissioner,* 300 U. S. 5 (1937), it was felt that a beneficial interest in the source of the income had been assigned and just as would have been the fact in the *Horst* case if the bond as well as the coupons had been transferred.

The record herein contains nothing as to the nature of a general agency contract or the business conducted thereunder, except what may be gathered from the contracts themselves, which appear as exhibits to the stipulation of facts. From those contracts, however, it appears that general agency contracts are far more than contracts for the rendering of personal services by the agent. They are contracts for the carrying on of a business. They contemplate the appointment of sub-agents; they require the general agents to employ "a sufficient number of agents to canvass the territory named," and to see to it that the insurance company is "represented therein by efficient, active agents" (R. 27, 30). Commissions payable under such contracts represent in substance the receipts of a business, the excess of which over expenses constitute net income. The contracts themselves refer to the agency as a "business", as in the statement that "the business shall be conducted in all respects in accordance with the instructions of said party of the first part" (R. 27) and in the agreement against

assignment or transfer of "said agency or business" without consent (R. 28). It is common knowledge that such contracts are commonly bought and sold, and likewise are often bought in for value by the insurance company concerned. It is of record here that a successor to Eubank paid $12,000 for the right to take over the Aetna Life Insurance Company agency one month prior to the termination date otherwise in effect (R. 24).

The assignments here involved thus may be likened to a transfer of a business in liquidation. The contracts expressly provide that the renewal commissions payable under the contracts after termination of the agency "shall be accepted in full compensation for his interest in the agency hereby conveyed" (R. 32, 29). The amounts payable are the same renewal commissions which the general agent would have received if the general agency had continued, less a charge for collecting the premiums with respect to which the commissions become payable and less any commissions payable to sub-agents (R. 28-9, 32; see Ex. D following R. 34).

In any event, this is either a case in which the assignor transferred the source of the income, or a case in which there was no source or corpus which could be transferred. It is not a case of retention of control of the source.

Second, this is not a case in which the taxpayer obtained "the satisfaction of his wants" by means of the disposition during the taxable year of his right to receive income. Whatever satisfaction the taxpayer may have obtained he plainly obtained in 1924 and 1928 when the assignments were made. The statute taxes income realized in each taxable year. It does not tax in 1933 satisfactions, material or otherwise, obtained five or nine years

earlier. In the *Horst* case, the taxpayer's disposition of income during the tax year did accomplish a "satisfaction of wants" during that year.

Thus nothing in the decision or in the reasoning in the *Horst* case compelled or warranted the decision in this case. The language of the opinion in this case, taken with its brevity, indicates that the Court, regarding this case as concluded by the *Horst* case, may not have considered the scope and effect of its decision here. A consideration of the principles necessarily involved in the decision in this case should persuade the Court to reconsider and disaffirm its decision.

3. The decision in this case necessarily imports a principle of law not required by the statute or in policy, which is discriminatory, unfair and impracticable in its operation.

The respondent, as shown above, assigned his entire right, title and interest in the contracts producing the renewal commissions and retained no interest or control of any kind. If this Court, nevertheless, considers the assignment to be merely an assignment of the right to income only, then the decision must mean that in no case can one entitled to receive income in the future divest himself of such income by voluntary assignment, as far as federal income taxation is concerned, unless the source of such income is a fund, corpus or physical asset. In the case of securities, land or other like assets, the courts have recognized irrevocable assignments of income as divesting the assignor for tax purposes, if the assignment is accompanied by the creation of a legal or beneficial estate in the assignee for the period of time for which the assignment of income is made

—a purely legalistic concept. That result has always been taken for granted, as in *Blair* v. *Commissioner, supra.* The supposed principle permitting the divestment of income in the one case, for tax purposes, and forbidding it in the other, lacks any basis in the statute or in policy.

Surely it is not required by the statute. Section 22, on which alone the supposed rule could be based, purports to do nothing more than to state what is to be included in income; it makes no effort to define to whom income is to be taxed.

Moreover, the statutory scheme seems to require the opposite result. At the very least, what was assigned by the donor in this case was a chose in action, which is property. The basis of that property in the hands of the donor was zero. Its basis in the hands of the donee was the same, by virtue of the provisions of Section 113(a)(2) of the Revenue Act of 1932. On any sale by the assignee of the rights assigned, the entire amount of the gain would accordingly be income *to the assignee* by virtue of Sections 111 and 112. See *Taft* v. *Bowers,* 278 U. S. 470 (1929). It can hardly have been contemplated that a different result would follow where, instead of a sale by the assignee, the assignee simply collects.

Again let us assume that an insurance agent, in lieu of his contract right to receive renewal commissions over a ten-year period, receives a non-interest-bearing note in an amount equal to the estimated commissions to be received, of an assumed value of one-half of the total amount of commissions ultimately collected, and that he promptly makes a gift of such note. The note constitutes income to the agent in the amount of its fair value at the time of

receipt, but surely the difference between the fair value and the amount ultimately collected thereon constitutes gain to the donee. It is not evident why a greater tax burden should be borne by an agent who receives no taxable income prior to the time when he makes a gift of his entire rights.

It is certainly not true generally under the Revenue Act that the non-material satisfaction derived by a donor from making a gift constitutes realization of income for tax purposes, either at the time of gift or at any other time. A gift has not been considered the equivalent of a sale. For example, if a donor makes a gift of a capital asset which has increased in value since he acquired it, the gift does not constitute realization of income in the amount of such increase. Prior to the Revenue Act of 1921 the amount of such increase escaped taxation altogether, even when the property was sold by the donee, the donee's taxable basis being the value of the property at the date of gift. Congress remedied this situation in the Revenue Act of 1921 but the remedy adopted was not to tax the increment in value to the donor at the time of gift or at any other time, but to make the donee take the donor's basis in computing his taxable gain. In that way the increase in value during the time of the donor's ownership was taxed to the donee. See *Taft* v. *Bowers, supra.*

The supposed principle thus seems at variance with the statutory scheme.

It might not be unfair if Congress decided to treat the making of a gift as the realization of income to the same extent as on a sale and thus to tax a donor at the time of the gift on the amount of any theretofore untaxed appreciation in value. It would be utterly unfair, however, if Congress

should provide that a donor should be taxed not only on appreciation of value up to the time of the gift but on any appreciation of value occurring while the property was held by the donee. That, however, is the effect of the decision in the present case. The respondent in 1924 and in 1928, respectively, gave up all control over the contracts. It is clear that the full amount of whatever satisfaction he derived was limited to the value of these contracts in 1924 and in 1928 and was not measured by the amount the assignee ultimately collected. The decision in this case entirely ignores these limitations of time and value.

The unfairness of the discrimination against the taxpayer, whose income is receivable only by virtue of his business or services, in withholding from him a tax privilege, the substance of which is available to one whose income consists of returns from capital assets, has been adverted to above. In other respects, the supposed principle is unfair, discriminatory and unworkable.

What is to happen, for instance, if the assignee sells for a valuable consideration the entire assigned contract during, say, the year following the original assignment? Does the full amount realized by the assignee automatically become income to the assignor in the year of such sale, or is it to be the rule that the assignor is to continue to take up into his income the commissions which it is estimated he would have received if the sale had not been made, or are the commissions actually received by the second assignee to be taken up in the income of the first assignor—a solution not available if the contract has been sold to the insurance company and cancelled.

There is no apparent reason why the principle would not be applied to the gift or a going business, to the extent

that accounts receivable thereof when received would be income. On the other hand, presumably it would not apply in the case of a gift of a stock certificate, the basis of which in the hands of the donor was zero, in spite of the fact that every amount received by the donee, whether as dividends, on a sale of the stock, or on liquidation of the corporation, would be income.

This argument is not made on the assumption that the tax laws must necessarily represent in all respects an integrated whole or must be in all respects devoid of discriminatory features. Yet it should be the aim of the courts so to construe them as to give effect to the entire statutory scheme, including in this instance the provisions with respect to the taxation of donees, and to eliminate, rather than to create, discriminations not required by the language of the statute. For the solution of the present problem the use of the words "compensation for personal services" in Section 22 adds nothing to the word "income" therein, and the use there of the word "income" certainly does not compel, if it can be stretched to permit, a doctrine that income, the right to which once accrues to a taxpayer, must always be taxed to him, although he never received it. The doctrine plainly does not apply if the right to the income accrues by virtue of the holding of securities, land or other like assets, where an "interest" in such assets for the period of time in question can be created. Whether such a doctrine should exist ought to be seriously considered, or reconsidered, by this Court.

CONCLUSION

It is prayed that this cause be set down for reargument at the earliest convenient session of this Court.

Respectfully submitted,

E. W. DEBEVOISE,
HARRY J. RUDICK,
Counsel for Respondent.

January 20, 1941.

CERTIFICATE UNDER RULE 33

E. W. DEBEVOISE, one of the attorneys for respondent, certifies that he is a member of the Bar of this Court; that he has prepared the foregoing Petition and is familiar with all the facts stated therein; and that the foregoing Petition is submitted in good faith and not for purposes of delay.

New York, N. Y., January 20, 1941.

E. W. DEBEVOISE

P. 1, separate opinion.

SUPREME COURT OF THE UNITED STATES.

No. 205.—October Term, 1940.

Guy T. Helvering, Commissioner of Internal Revenue, Petitioner, *vs.* Gerald A. Eubank.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[November 25, 1940.]

Mr. Justice Stone delivered the opinion of the Court.

This is a companion case to No. 27, *Helvering* v. *Horst*, decided this day, and presents issues not distinguishable from those in that case.

Respondent, a general life insurance agent, after the termination of his agency contracts and services as agent, made assignments in 1924 and 1928 respectively of renewal commissions to become payable to him for services which had been rendered in writing policies of insurance under two of his agency contracts. The Commissioner assessed the renewal commissions paid by the companies to the assignees in 1933 as income taxable to the assignor in that year under the provisions of the 1932 Revenue Act, 47 Stat. 169, § 22 of which does not differ in any respect now material from § 22 of the 1934 Revenue Act involved in the *Horst* case. The Court of Appeals for the Second Circuit reversed the order of the Board of Tax Appeals sustaining the assessment. 110 F. (2d) 737; 39 B. T. A. 583. We granted certiorari October 14, 1940.

No purpose of the assignments appears other than to confer on the assignees the power to collect the commissions, which they did in the taxable year. The Government and respondent have briefed and argued the case here on the assumption that the assignments were voluntary transfers to the assignees of the right to collect the commissions as and when they became payable, and the record affords no basis for any other.

For the reasons stated at length in the opinion in the *Horst* case, we hold that the commissions were taxable as income of the assignor in the year when paid. The judgment below is

Reversed.

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SUPREME COURT OF THE UNITED STATES.

No. 205.—October Term, 1940.

Guy T. Helvering, Petitioner, *vs.* Gerald A. Eubank.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[November 25, 1940.]

The separate opinion of Mr. Justice McReynolds.

The cause was decided upon stipulated facts. The following statement taken from the court's opinion discloses the issues.

"The question presented is whether renewal commissions payable to a general agent of a life insurance company after the termination of his agency and by him assigned prior to the taxable year, must be included in his income despite the assignment.

"During part of the year 1924 the petitioner was employed by The Canada Life Assurance Company as its branch manager for the state of Michigan. His compensation consisted of a salary plus certain commissions. His employment terminated on September 1, 1924. Under the terms of his contract he was entitled to renewal commissions on premiums thereafter collected by the company on policies written prior to the termination of his agency, without the obligation to perform any further services. In November 1924 he assigned his right, title, and interest in the contract as well as the renewal commissions to a corporate trustee. From September 1, 1924 to June 30, 1927, the petitioner and another, constituting the firm of Hart & Eubank, were general agents in New York City for the Aetna Life Assurance Company, and from July 1, 1927 to August 31, 1927, the petitioner individually was general agent for said Aetna Company. The Aetna contracts likewise contained terms entitling the agent to commissions on renewal premiums paid after termination of the agency, without the performance of any further services. On March 28, 1928, the petitioner assigned to the corporate trustee all commissions to become due him under the Aetna contracts. During the year 1933 the trustee collected by virtue of the assignments renewal commissions payable under the three agency contracts above mentioned, amounting to some $15,600. These commissions were taxed to the petitioner by the commissioner and the Board has sustained the deficiency resulting therefrom."

The court below declared—

"In the case at bar the petitioner owned a right to receive money for past services; no further services were required. Such a right is assignable. At the time of assignment there was nothing contingent in the petitioner's right, although the amount collectible in future years was still uncertain and contingent. But this may be equally true where the assignment transfers a right to income from investments, as in *Blair* v. *Commissioner*, 300 U. S. 5, and *Horst* v. *Commissioner*, 107 F. (2d) 906 (C. C. A. 2), or a right to patent royalties, as in *Nelson* v. *Ferguson*, 56 F. (2d) 121 (C. C. A. 3), cert. denied 286 U. S. 565. By an assignment of future earnings a taxpayer may not escape taxation upon his compensation in the year when he earns it. But when a taxpayer who makes his income tax return on a cash basis assigns a right to money payable in the future for work already performed, we believe that he transfers a property right, and the money when received by the assignee, is not income taxable to the assignor."

Accordingly, the Board of Tax Appeals was reversed; and this, I think, is in accord with the statute and our opinions.

The assignment in question denuded the assignor of all right to commissions thereafter to accrue under the contract with the insurance company. He could do nothing further in respect of them; they were entirely beyond his control. In no proper sense were they something either earned or received by him during the taxable year. The right to collect became the absolute property of the assignee without relation to future action by the assignor.

A mere right to collect future payments, for services already performed is not presently taxable as "income derived" from such services. It is property which may be assigned. Whatever the assignor receives as consideration may be his income; but the statute does not undertake to impose liability upon him because of payments to another under a contract which he had transferred in good faith, under circumstances like those here disclosed.

As in *Helvering* v. *Horst* just decided, the petitioner relies upon opinions here; but obviously they arose upon facts essentially different from those now presented. They do not support his contention. The general principles approved in *Blair* v. *Commissioner*, 300 U. S. 5, and applied in *Helvering* v. *Horst*, are controlling and call for affirmation of the judgment under review.

The Chief Justice and Mr. Justice Roberts concur in this opinion.